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33362

JOSEPH KAMFNER,
Appellant,

v.

AUBURN PARK TRUST &
SAVINGS BANK, O. L. HALBERG
and O. EARL HALBERG,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from the dismissal of a bill in chancery, as finally amended, for want of equity, after issues joined by the bank, and a hearing had before the chancellor. O. L. Halberg did not appear and O. Earl Halberg appeared pro se but filed no pleading.

The bill alleged in substance that complainant gave O. L. Halberg checks payable to the latter's order aggregating \$3000, for the express purpose of making a deposit for complainant on a real estate transaction; that said O. L. Halberg endorsed the checks to O. Earl Halberg to carry out such purpose; that the latter deposited them in his own personal checking account in appellee bank for the purpose of using the account to make the deposit on such real estate transaction and drew his check thereon for such purpose, and that the checks so deposited in O. Earl Halberg's account constituted a special trust fund of which said bank had knowledge and of which complainant gave the bank notice after hearing that the bank, to which O. L. Halberg was largely indebted, intended to appropriate the account of said O. Earl Halberg to apply on the indebtedness of said O. L. Halberg; that

25-1-18-18

11/10/18

32522

JOSEPH KAMMER, Appellant,

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

ALBION PARK TRUST & SAVINGS BANK, O. E. HAINES, and O. EARL HAINES, Appellees.

MR. THEODORE JUSTICE HAINES

DELIVERED THE OPINION OF THE COURT.

This appeal is from the dismissal of a bill in chancery, as finally amended, for want of equity, after issues joined by the bank, and a hearing had before the chancellor. O. E. Hainberg did not appear and O. Earl Hainberg appeared pro se but filed no pleading.

The bill alleged in substance that complainant gave O. E. Hainberg checks payable to the latter's order aggregating \$3000, for the express purpose of making a deposit for complainant on a real estate transaction; that said O. E. Hainberg endorsed the checks to O. Earl Hainberg to carry out such purpose; that the latter deposited them in his own personal checking account in appellee bank for the purpose of using the account to make the deposit on such real estate transaction and drew his check thereon for such purpose, and that the checks so deposited in O. Earl Hainberg's account constituted a special fund of which said bank had knowledge and of which complainant gave the bank notice after hearing that the bank, to which O. E. Hainberg was largely indebted, intended to appropriate the account of said O. Earl Hainberg to apply on the indebtedness of said O. E. Hainberg; that

complainant then demanded of the bank, and it refused, the return of said "trust fund."

The bill prayed that such "fund of \$3,000.00" be declared a trust fund, that the bank be ordered to return the same with interest, and the Halbergs be removed as trustees. The bank's answer denied knowledge of the dealings between complainant and its co-defendants, and denied generally, and in most respects specifically, the other allegations of the bill.

None of the said several allegations of the bill is brought in question except the claim that the checks so deposited constituted a "special trust fund," and the claim that the bank had knowledge and notice thereof. We think neither of these claims is substantiated by the evidence. The evidence as to the former is that complainant desiring to avail himself of an opportunity to buy real estate in Mokena, Illinois, brought to his attention by O. L. Halberg, gave or caused to be given to the latter said checks to be paid as earnest money to the seller in Mokena, and that to carry out the transaction O. L. Halberg endorsed said checks, deposited them to the credit of the checking account of his son O. Earl in said bank and in the latter's name drew a check thereon which was forwarded to Mokena and protested for non-payment, the bank having appropriated the checking account of O. Earl to apply on an unpaid note it held against O. L. Halberg. In this transaction O. L. Halberg was clearly the agent of complainant to procure the contract of deed. Of course, the act involved reposing confidence or trust in Halberg, and manifestly there was no intention by Halberg to abuse it in the means he employed to carry out his agency. But as said in Doyle v. Murphy, 22 Ill. 502, where a similar question was before the court, that the court has jurisdiction in cases of strict trust there is no

complaint then demanded of the bank, and it refused, the return of said "trust fund."

The bill prayed that such "fund of \$2,000.00" be declared a trust fund, that the bank be ordered to return the same with interest, and the Halbergs be removed as trustees. The defendant answers denied knowledge of the dealings between complainant and the co-defendants, and denied generally, and in most respects specifically, the other allegations of the bill.

None of the said several allegations of the bill is brought in question except the claim that the checks so deposited constituted a "special trust fund," and the claim that the bank had knowledge and notice thereof. We think neither of these claims is substantiated by the evidence. The evidence as to the former is that complainant desiring to avail himself of an opportunity to buy real estate in Havana, Illinois, brought to his attention by O. I. Halberg, gave or caused to be given to the latter said checks to be paid as earnest money to the seller in Havana, and that to carry out the transaction O. I. Halberg exchanged said checks, deposited them to the credit of the checking account of his son O. Earl in said bank and in the latter's name drew a check thereon which was forwarded to Havana and presented for non-payment, the bank having appropriated the checking account of O. Earl to apply on an unpaid note it held against O. I. Halberg. In this transaction O. I. Halberg was clearly the agent of complainant to procure the contract of sale. Of course, the act involved requiring confidence or trust in Halberg, and manifestly there was no intention by Halberg to abuse it in the manner he employed to carry out his agency. But as said in Louis v. Murphy, 22 Ill. 503, where a similar question was before the court, that the court has jurisdiction in cases of strict trust there is no

doubt, "but it does not therefore follow that the court will assume jurisdiction in every case where a mere confidence has been reposed or a credit given. The various affairs of life in almost every act between individuals in trade and commerce involve the reposing of confidence or trust in each other and yet it never has been supposed that because such a confidence or trust in the integrity of another has been extended or abused, that therefore a court of equity would in all such cases assume jurisdiction." There it was held in effect that money delivered to a person to pay debts, which he converts to his own use, does not enable the heirs of the party who reposed confidence, to convert it into a trust fund. The same doctrine is expressed in Taylor v. Turner, 87 Ill. 296; Shipherd v. Furness, 153 Ill. 590, and Weer v. Gand, 88 Ill. 490. The relationship upon which the question arose in those cases was deemed one of agency, and while it was said a confidence and trust was imposed to a greater or less extent in such transactions they have never been regarded by courts as falling within any recognized class of trusts and that equity will not assume jurisdiction to establish trusts in every case where confidence has been reposed or credit given. Upon the facts stated the relationship here between complainant and O. L. Halberg was that of principal and agent and not of trustee and cestui qui trust. The facts do not constitute a special trust, as they would if the deposit had been specifically made in the defendant bank for the use of complainant. Cases cited by appellant are of that character. The deposit was in form and character a checking deposit to the credit of O. Earl Halberg, and whatever right, if any, defendant had to appropriate his account for the satisfaction of an indebtedness against his father the bank's action in that respect conferred no right against it in be-

...but it does not therefore follow that the court will assume jurisdiction in every case where a mere confidence has been reposed or a credit given. The various affairs of life in almost every act between individuals in trade and commerce involve the reposing of confidence or trust in each other and yet it never has been supposed that because such a confidence or trust in the integrity of another has been extended or abused, that therefore a court of equity would in all such cases assume jurisdiction. There it was held in effect that money delivered to a person to pay debts, which he converts to his own use, does not enable the holder of the debt who reposed confidence, to convert it into a trust fund. The same doctrine is expressed in Taylor v. Turner, 37 Ill. 290; Richford v. Burges, 185 Ill. 290, and West v. Bond, 88 Ill. 470. The relationship upon which the question arose in those cases was based not of agency, and while it was said a confidence and trust was imposed in a greater or less extent in such transactions they have never been regarded by courts as falling within any recognized class of trusts and thus equity will not assume jurisdiction to establish trusts in every case where confidence has been reposed on credit given. Upon the facts stated the relationship here between complainant and O. L. Halberg was that of principal and agent and not of trustee and beneficiary and trust. The facts do not constitute a special trust, as they would if the deposit had been specifically made in the defendant bank for the use of complainant. Cases cited by appellant are of that character. The deposit was in fact and character a checking deposit to the credit of O. L. Halberg, and whatever rights, if any, defendant had he appropriated his account for the satisfaction of an indebtedness against his father the bank's action in this respect conferred no rights against it in de-

half of appellant. He had no right to complain if it was not a trust fund. Being a general deposit it was commingled with the funds of the bank and became a part of its general funds and created such liability to repay the same as is established by the custom and usages of the business. (Goodhouse v. Crandall, 197 Ill. 104; Hetherell v. O'Brien, 140 Ill. 146; Mutual Accident Assn. v. Jacobs, 141 Ill. 261.)

Nor without notice to the bank of the relationship between complainant and O. L. Halberg or the purpose of the deposit was there any privity of contract between complainant and the bank, and hence no basis for the action against it. (Provers National Bank v. O'Hare, 119 Ill. 646.)

But in our opinion the evidence clearly establishes that there was no such notice. The bank records and other proof tend most strongly to show that the bank closed out the checking account of O. ^{Earl} Halberg before Saturday noon, January 9, 1926, by applying the same on the indebtedness of Oscar L. Halberg, and that it received no notice of the transaction between complainant and O. L. Halberg before 7 o'clock that evening. Without such notice an essential element of the cause of action is lacking. A somewhat similar case is Willey v. Crocker-Woolworth National Bank, 141 Cal. 508, 75 Pac. 106. There one Perry had a general deposit account with the bank in the name of A. B. Perry Company. Sometime later he took in a partner and conducted the business under that name, but without the knowledge of the bank which appropriated the account on his personal indebtedness. The decision was based solely on the ground that the bank had no notice of the partnership. In 7 C. J. p. 659, the rule is stated as follows: "It is usually considered, however, that where the bank has no notice that funds deposited

are held by the depositor in trust it may apply such deposit to the depositor's debt without becoming liable to the beneficial owner." Quoting from the same in Arnold v. San Ramon Valley Bank, (California), 13 A. L. J. 323, the court said: "The point is so well established by authority, both in this State and elsewhere that we deem it unnecessary to discuss it on principle." And referring to some cases to the contrary the court said: "We are not disposed to follow these cases in view of the thoroughly established rule to the contrary." In an exhaustive note to the Arnold case in 13 A. L. J. it is stated that the principle so enunciated is in accordance with the decided weight of authority, and we think it is in accordance with the general line of decisions in this State.

We think the evidence had no legitimate tendency to establish such a special trust or a trust of which equity will take cognizance, therefore the bill was properly dismissed for want of equity.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

33371

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ROBERT KURFIRST,
(alias Bob Kurfirst),
Plaintiff in Error.

23-1A-6-3
ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case No. 33370, People v. Patten, and presents the same state of facts and involves the same question as that decided in our opinion this day filed in the case of People v. Patten, supra, namely, whether the Motor Vehicle Act requires a license fee to be paid for the use of "semi-trailers" on the public highways. For the reasons stated in our said opinion the judgment of conviction herein will be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

33372

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error.
v.

PAUL A. FISCHER,
Plaintiff in Error.

25 1A 083
ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case No. 33370, People v. Patten, and presents the same state of facts and involves the same question as that decided in our opinion this day filed in the case of People v. Patten, supra, namely, whether the Motor Vehicle Act requires a license fee to be paid for the use of "semi-trailers" on the public highways. For the reasons stated in our said opinion the judgment of conviction herein will be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.



Fig. 1. Schematic diagram of the mechanism.

The mechanism is a lever of the first kind. The lever is pivoted on a fixed point. The weight of the lever is G . The weight of the load is P . The weight of the counterweight is Q . The distance from the pivot to the center of gravity of the lever is a . The distance from the pivot to the point of application of the load is b . The distance from the pivot to the point of application of the counterweight is c . The condition for equilibrium is $G \cdot a = P \cdot b + Q \cdot c$. The mechanism is used for lifting loads.

33378

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error.

FRANK SPINALE,
Plaintiff in Error.

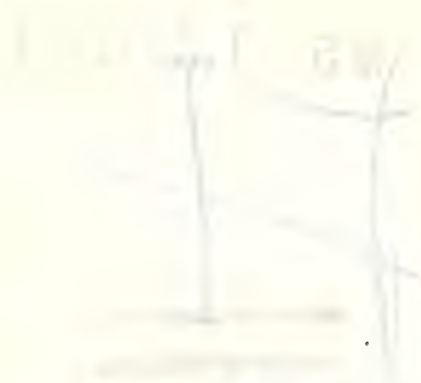
25-1A-6114
BRANCH TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case No. 33370, People v. Patten, and presents the same state of facts and involves the same question as that decided in our opinion this day filed in the case of People v. Patten, supra, namely, whether the Motor Vehicle Act requires a license fee to be paid for the use of "semi-trailers" on the public highways. For the reasons stated in our said opinion the judgment of conviction herein will be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.



Hand-drawn diagram of a structure with multiple lines and labels.

Hand-drawn diagram of a structure with multiple lines and labels.

Hand-drawn diagram of a structure with multiple lines and labels.

33374

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error.

v.

LOYD (alias Lloyd) FRAVEL,
Plaintiff in Error.

25-1-A-604
ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case No. 33370, People v. Patten, and presents the same state of facts and involves the same question as that decided in our opinion this day filed in the case of People v. Patten, supra, namely, whether the Motor Vehicle Act requires a license fee to be paid for the use of "semi-trailers" on the public highways. For the reasons stated in our said opinion the judgment of conviction herein will be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

Staphylinidae: 60% (18 species)

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SECRET (except where
indicated otherwise)

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THESE ARE THE NAMES OF THE PERSONS WHOSE NAMES ARE LISTED IN THE

Document ID: A-1179 dated 06/18/2000

33414

CATHERINE MATHIAS,
Appellee,

v.

WILLIE WILSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff, alleging she was a licensed real estate broker and that she sold a parcel of real estate for defendant, sued for a commission of 3 per cent on the purchase price, amounting to \$585 and obtained judgment therefor on a trial had before the court without a jury. Defendant in her affidavit of merits denies that plaintiff was a licensed real estate broker and that she sold the property mentioned for defendant and that she is entitled to 3 per cent commission on the purchase price. Defendant further alleges that she is not indebted to plaintiff in any sum but that plaintiff is indebted to her, after allowing plaintiff all just credits, deductions and set-offs. She does not, however, plead a set-off nor make a showing of the right to one. The claim of set-off is predicated on an unpaid balance of a promissory note from plaintiff to defendant's order. It appeared, however, that a judgment had been taken on the promissory note in the name of defendant's attorney to whom it was endorsed. Hence the balance due thereon, having been merged into a judgment in his favor, could not be the subject of a set-off for defendant.

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

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10. The use of the following arts of book making, repair

Defendant did not testify. The only testimony in her behalf was that given by her attorney. His testimony was to the effect that plaintiff had told him that there was a copartnership arrangement between plaintiff and defendant whereby each "was entitled to 1/2 of the commission (of 3 per cent), no difference which one of them sold the property." It was admitted that plaintiff sold the property in question for defendant and that the commission at 3 per cent would be \$535. Defendant's attorney offered to prove that after judgment was taken on the note referred to plaintiff sought to vacate the same upon her affidavit stating that she "agreed at that time (when the sale was made) that she would settle the commission claim upon the rate of 1-1/2 per cent or \$293.50, said sum to be applied upon the note." The proof was properly rejected on the ground that it merely tended to show an offer of a compromise. And if made it does not appear to have been accepted. Plaintiff denied the partnership arrangement with defendant and an agreement for only one-half of the regular commission on such sale.

But plaintiff testified that the purchaser of the property gave her a \$100 deposit and that she so informed defendant, and defendant's attorney testified that she never turned it over to defendant. His testimony was not objected to nor denied, nor was there proof to the contrary. Defendant, therefore, was entitled to recoup \$100 from the amount of the commission sued for in the transaction.

Plaintiff, over defendant's objection, offered in evidence a certified copy of the city's record granting her a broker's real estate licence. The licence itself was the best evidence.

She testified, however, without objection, that she had been a licensed broker for several years, and on cross-examination stated that she took out her license at defendant's address because she had an office there. The cross-examination assumed that she had such license and no attempt was made to prove the contrary. We think there was prima facie proof that she was a licensed broker.

Accordingly the judgment is reversed and judgment entered here against defendant for \$485 with a finding of fact.

REVERSED WITH FINDING OF FACT AND JUDGMENT HERE.

Scanlan and Gridley, JJ., concur.

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33414

FINDING OF FACT.

We find that appellee received \$100 on the real estate transaction upon which she sued for commissions and never paid over the same to appellant, and, therefore, that appellant is entitled to recoup the same.

THE HISTORY OF THE

The first part of the history of the
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 world from the beginning of
 the world to the present time.
 The second part of the history of the
 world is the history of the
 world from the present time to the future.
 The third part of the history of the
 world is the history of the
 world from the future to the end of the world.

33427

RAVLE TANK COMPANY,
a corporation,
Appellee,

v.

GUSTAVE W. STEGE et al.,
Defendants.

STEEG PARK RIDGE LAUNDRY,
Inc.,

Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree of foreclosure of a mechanic's lien in favor of complainant as a subcontractor. The issues presented arise upon an intervening petition by appellant which became owner of the premises involved after commencement of the suit. The owners at the time of the transaction on which the claim for a lien is based were Gustave Stege and his wife. Said Stege is president of the intervening petitioner.

The material facts set forth in the bill of complaint as amended were found in the decree to be fully established by the proofs, and they are largely confirmed by the testimony of said Stege.

The negotiations for the erection of a building on the premises in question were had with said Stege. The building plans prepared by the architects were for a laundry building and provided for two 5000-gallon tanks of certain dimensions to be

supported on the roof of the building by means of certain tank beams, all forming a part of the building especially designed for laundry purposes.

Stege's own testimony is to the effect that an arrangement was made between him and an agent of the David Jones Company of St. Louis for the delivery and erection of the tanks. That company made a contract with complainant, the Eagle Tank Company, for the same. They were delivered at the building in separate parts, hauled up on the roof and assembled and placed in position by the latter company. Stege knew they were delivered and erected there by complainant. They were set on iron beams "bolted in," and "on brick cemented in," connected with water pipes leading into the building from the city mains and to the washing machines and hot water heater, and when installed furnished the only water used in the building for the laundry, and were specially suitable and adapted for that purpose. The pipes were connected with each tank by means of a metal flange inserted in its bottom by a plumber, and were threaded and screwed into the flanges.

Complainant furnished the material and labor for the erection of the tanks pursuant to a contract with the David Jones Company. Stege first placed an order with the latter company for the tanks on August 23, 1926, and other material, specifying the price of each item, including that of the tanks at \$750. On the same day notes were given for the aggregate amount of the order and secured by a chattel mortgage on the materials covered by the order. In November, 1926, complainant received an order from the David Jones Company for the tanks in question which merely called for the shipment of the tanks. Complainant regarded the same

as calling for the tanks "to be shipped knocked down only." Being informed by the agent of the Jones Company to the contrary, who gave verbal authority to erect the tanks, which was subsequently confirmed by letter, complainant delivered the tanks, and on December 13, 1928, completed the erection work. January 21, 1927, complainant, in compliance with law, gave notice of its lien to Stege and wife for \$771.36, in which it notified them of furnishing the labor and materials for the tanks under contract with the David Jones Company. The tanks are still in the building and connected with the water pipes as aforesaid.

From these uncontroverted facts we think there can be no doubt that the tanks as constructed and connected with the water main and laundry machinery in the building are a part of the fixtures, apparatus and machinery of the laundry and as such attached to the realty, and, under the authorities, are subject to the Mechanic's Lien Act. (Pehr Construction Co. v. Pestl. System, 233 Ill. 634, 641; Owings v. Stege, 256 Id. 553, 557; Edward Hines Lumber Co. v. G. L. Chemical Works, 237 Ill. App. 246, 255.)

That the contract was partly oral and partly written is immaterial so far as the rights of a lien under the act is concerned (Stepina v. Conklin Lumber Co., 134 Ill. App. 173, 280), and the contract having been made with Stege, the husband, one of the joint owners of the premises, under section 3 of the Act it was binding on his wife.

We cannot agree with the contention that the relations of Stege with the Jones Company do not come under section 1 of the Act. The contract comes within its scope as one to "furnish material, fixtures, apparatus and machinery," and the David Jones

Company made a contract with Stege, according to his own testimony, to set up and erect the tanks, and as that company let out the job to complainant which supplied the material, constructed the tanks and erected them as aforesaid, complainant was clearly a subcontractor as defined by the Act.

The owners received no statement from the contractor as is required by the Act, and it is contended that because the David Jones Company was a manufacturer and distributor of laundry and dry cleaning machinery and supplies it was a merchant and dealer in materials only and so under section 3 of the Act was relieved from giving the owner or his agent, etc., the statement therein required. But section 3 is not applicable to the case, it appearing said company not only agreed to furnish the tanks but to erect them. But a like provision in a former statute was held not to apply to a subcontractor. (Standard Radiator Co. v. Fox, 86 Ill. App. 389, 391.)

The point is also made that the property was not described or located by contract and that the lien must fail for that reason. The property was "correctly described in the notice or claim for lien and in the uncontradicted allegations of the pleadings, which are sustained by the evidence," and all parties interested understood what lots were meant and what materials were to be furnished. Under such circumstances it has been held that "the failure of a contract to particularly describe the lots upon which a building is to be erected will not defeat a mechanic's lien. (Bastrup v. Prendergast, 179 Ill. 585.)"

It is argued that because the David Jones Company took a mortgage on all the articles it contracted to sell to Stege it took additional security and as a contractor could not maintain a

mechanic's lien and, therefore, the subcontractor could not. It is enough to say that section 1 of the Act now provides that the taking of additional security will not be a waiver of any right of lien under the Act "unless made a waiver by express agreement of the parties." There was no such agreement in this case nor anything that can be construed as having the legal effect to cut off the right of lien by the subcontractor under the provisions of section 21 of the Act.

It is urged that the amended bill seeks to recover the reasonable value of the materials and labor and that as there was a written contract therefor with the contractor at the specified price of \$750, recovery cannot be had on quantum meruit. It was agreed that if a recovery could be had under the bill on a quantum meruit the amount of \$771.36 as the amount of labor and material furnished by the subcontractor would not be questioned, and the lien was given for that amount and interest.

It appears that the contractor has been paid without requiring a statement of the amounts owing subcontractors and material men "in violation of the rights and interests of the persons intended to be benefited by this Act." Hence we think the amount for which the lien was given, especially in view of such agreement with regard thereto, was properly allowed under section 21 of the Act.

The decree is affirmed.

AFFIRMED.

Scaplan and Gridley, JJ., concur.

33382

GO. PINOS,

Appellee.

v.

CHARLES H. STERN,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for \$1,000, following the verdict of a jury upon a second trial and entered by the superior court of Cook county on December 1, 1926, in an action for damages for malicious prosecution.

The action was commenced on July 29, 1925. Plaintiff's amended declaration, filed March 1, 1927, consisted of two counts. Defendant's demurrer to the second count was sustained and the case was tried upon the first count and defendant's plea of the general issue thereto.

In said first count plaintiff alleged that on December 2, 1924, defendant, maliciously intending to injure plaintiff in his good name, credit, etc., appeared before Joseph W. Schulman, one of the judges of the municipal court of Chicago, and "falsely and maliciously, and without any reasonable or probable cause whatsoever, charged plaintiff with having feloniously and maliciously injured and defaced a certain building then and there owned by one Esther Stern, * * without having the consent of said Esther Stern, and that the damages then and there done to said building exceeded \$80, to-wit, \$600;" that upon such charge defendant, falsely and maliciously, etc., caused and procured said Judge Schulman "to

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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11. The following information was obtained from a review of the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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decree that a warrant be issued for the apprehending and taking of plaintiff" and bringing him before said judge "to be dealt with according to law for the supposed offense;" that afterwards, on December 29, 1924, defendant, by virtue of said warrant, wrongfully and unjustly and without any reasonable or probable cause, caused plaintiff to be arrested and imprisoned, and "kept in prison for the space of eight (8) hours * * until he was able to secure bonds, for which he expended large sums of money;" that afterwards, on or about May 18, 1925, defendant "caused plaintiff to appear" before Judge William M. Gemmill, one of the judges of the superior court of Cook county and then sitting in the criminal court of said county, "to be examined before said judge touching said supposed offense;" that said ^{Judge} Gemmill, "having heard and considered all that defendant could say or allege against plaintiff," etc., thereupon "adjudged and determined that plaintiff was not guilty of said supposed offense," and then and there discharged him; that defendant has not further prosecuted his complaint but has abandoned the same, and said prosecution is wholly ended; and that plaintiff, by reason of the premises, was otherwise greatly injured, and was compelled to and did expend large sums of money in retaining attorneys, hiring court reporters, and in preparing for his defense, etc.

On the trial the evidence disclosed in substance the following: Plaintiff, a native of Greece, had for many years been engaged in business as an insurance agent in Chicago, residing at 2833 East Adams street. Defendant was an iron and steel merchant in Chicago, conducting his business at 4850 South California avenue. His mother, Esther Stern, owned the building and premises, known as 516 East Roosevelt road, Chicago, and he managed the building for her. Prior to September, 1924, Louis Davlantis and Christ

portales were tenants of Mrs. Stern and conducted a restaurant in the building. They sold the restaurant and business to one Albert Hoffman who took possession and for a short time conducted the business. To secure part of the purchase price Hoffman gave to them a chattel mortgage on various enumerated chattels in the restaurant, including "one lot of panels and cornices." These panels were attached to the inside walls of the restaurant, were made of wood with a mahogany finish, and were securely fastened by wooden one-by-two strips, nailed to the walls, - the panels being nailed to the strips. Hoffman's ten notes of \$100 each were mentioned in the mortgage, - the first maturing on or before September 16, 1924, and the others monthly thereafter. In October, 1924, proceedings were taken to foreclose the mortgage and Hoffman ceased running the restaurant and abandoned the premises. On October 15, 1924, at the mortgage sale, plaintiff bought all of the chattels enumerated in the mortgage, including said panels. Hoffman gave or had given the key of the entrance door of the restaurant to plaintiff. All of the chattels continued to remain in the restaurant until shortly after November 24, 1924. The October rent had been paid, but the November rent had not. Herman L. Flotnick, who was engaged in business next door, had been and was acting as defendant's agent in collecting the monthly rent for the restaurant. On the afternoon of November 24th (Monday), Louis Constan, a dealer in store fixtures, etc., having been given the key to the entrance door of the restaurant by plaintiff and having been instructed by him to remove all of the chattels including the panels, entered the restaurant and was proceeding with a preparatory examination when Flotnick noticed him inside. In answer to Flotnick's inquiries,

Constan said that he had entered by means of the key, that plaintiff had instructed him to remove all of the chattels including the panels, and that he was soon going to do so. After Constan had left, Plotnick by telephone informed defendant of these happenings and Constan's statements. Defendant immediately consulted with his attorney, Lee D. Mathias, told him the substance of what Plotnick had said and the facts that the restaurant had been sub-leased to Hoffman, that Hoffman had abandoned the premises and that the November rent had not been paid, etc. Mathias advised defendant to have the entrance door to the restaurant securely fastened, etc. Acting upon this advice defendant instructed Plotnick to put on a new lock and securely fasten the door. This Plotnick did. He testified that he got "two one-inch screw eyes and a hook and put one of these in the door jamb and one inside the door over the lock so they could not open it," and also attached a padlock.

On Wednesday morning, November 26th, Constan again came to the restaurant, saw the new lock, etc., and went away. During the afternoon Constan again came, accompanied by plaintiff and "some laborers with a truck." When plaintiff walked towards the entrance Plotnick told him not to open the door, but plaintiff, having a wrench in his hands, started to pry off the hook and screw eyes and in so doing, according to Plotnick's testimony, "ripped up the whole door jamb," and effected an entrance to the restaurant. Thereupon Plotnick advised defendant by telephone of these happenings, and shortly thereafter defendant accompanied by Mathias arrived on the scene. In the interim, acting under plaintiff's orders, the laborers had removed some of the chattels and had also torn off from the walls of the restaurant some of the panels, causing the breaking and the disfiguring of the plaster, etc., on the walls. As to the entrance

door defendant testified that "the door is about 7 feet high and there was four or five feet of the frame of ^{the} door broken, from the top all the way down, and the staples or screw eyes were pulled out of the door." Mathias testified that "the door sill had been torn off and marks on the door showed that some force had been used." Mathias then told Constan (plaintiff having departed) that defendant did not object to the removal of such chattels as were not attached to the building, but that plaintiff had no right to remove, and should not remove, the panels which were nailed to the walls. Shortly thereafter Constan and the laborers departed, and Mathias advised defendant to employ a special policeman to guard the premises, and such a policeman was employed and remained on duty over Thanksgiving day and until early Friday morning, November 28th.

About 8:30 o'clock on the morning of November 28th, the laborers again came with the truck and began moving away some of the remaining chattels. About this time defendant, his brother, Maurice Stern, and Mathias arrived, as had previously plaintiff, his attorney, Richard Hill, Davlantis, Apostoles, Constan and others. Plaintiff was directing some laborers in tearing off certain panels from the walls and defendant complained to him about his obtaining entrance to the restaurant by forcibly breaking the locks, door jamb, etc., and protested his action in injuring the walls of the restaurant by forcibly tearing off the panels. Whereupon plaintiffs and others grabbed hold of defendant, and, as he testified, "bodily threw me out of the place on to the sidewalk," and defendant received a slight injury to his hand. Plaintiff, Davlantis and Apostoles all testified that none of them laid hands upon defendant. Plaintiff and the laborers continued to tear off other panels, notwithstanding the further protests of defendant and Mathias, and defendant telephoned

a police station and asked that policemen be sent. Thereupon plaintiff, his attorney, Hill, and defendant and Mathias, had a further conversation, at which plaintiff and Hill contended that plaintiff had a right to remove the panels from the walls and defendant and Mathias contended to the contrary. Finally it was agreed (certain policemen having in the meantime arrived) that the parties and their respective attorneys should go to the Maxwell street police station and consult one of the judges there. This they did, and one of the judges was advised in his chambers of the happenings. Defendant, acting under the advice of Mathias, asked that a warrant issue against plaintiff for "malicious mischief" for breaking open and damaging the entrance door of the restaurant and also damaging the walls of the restaurant, and plaintiff's attorney, Hill, asked that a warrant issue against defendant for "disturbing the peace."

The judge refused to issue either warrant, saying that, as plaintiff "lived in another police district," he did not have jurisdiction to issue a warrant against him, and defendant would have to go to the proper district. The judge, however, suggested that plaintiff commence a civil action in replevin to determine the question which party was lawfully entitled to the possession of the panels. Acting upon this suggestion plaintiff commenced a replevin action on the same day, November 28th, and replevied "1 lot of paneling measuring about 105 feet" and certain other enumerated chattels, all of the value of \$300. Plaintiff testified that he received all of the replevied chattels, including all panels, on the following day, November 29th.

On Tuesday, December 2, 1934, before a hearing was had in the replevin action, defendant, acting upon the advice of Mathias,

appeared in his company before Judge Schulman and executed a sworn "complaint for examination," charging that on November 26th, 1934, Gus Pinos had committed a criminal offense (stating it in language substantially as alleged in the first count of plaintiff's declaration above mentioned) and asked for the issuance of a warrant for Pinos' arrest, etc. The printed form of the complaint was filled out in Mathias' handwriting. After examining Stern (defendant) the court ordered that a warrant issue and that Pinos' bail be fixed at \$1500. In said order it is stated that it appears to the court "that the offense of malicious mischief has been committed and there is probable cause for believing that Gus Pinos is guilty of said offense." By virtue of the warrant he was arrested about noon on Saturday, December 6th, was taken to the Des Plaines street station and remained there for two hours, when he was released on bail. A full hearing on the complaint was had on December 31, 1934, at which time defendant and his brother testified and plaintiff and several witnesses for him gave testimony. At that hearing the testimony of plaintiff and his witnesses, Constan, as to which of them had broken the lock and door of the restaurant, was contradictory. Constan testified "he did not break open the door and lock, but that Pinos did." Pinos testified that that these acts were done by Constan. Judge Schulman held Pinos over to the grand jury and subsequently Pinos was indicted. He gave bonds for his appearance. On the hearing of the replevin case it was adjudged that Pinos was entitled to the possession of the panels and the other chattels replevied. No appeal was taken from that judgment. The indictment in the criminal case was returned in the criminal court of Cook county on February 19, 1935. It was drafted by the then State's Attorney of Cook county. It charged that "Gus

[illegible]

Pihos * * on November 28, 1924, in said county, feloniously, unlawfully, willfully and mischievously, and maliciously, did injure and deface a certain building there situate, known as No. 516 Roosevelt road, in the city of Chicago, then and there owned by Esther Stern, now deceased, and certain fixtures in said building, to-wit, restaurant and store, by then and there removing divers panels from the walls of said building * * and divers cornices, * * without then and there having the consent of said Esther Stern, and that the damage then and there done to said building and fixtures exceeds the sum of \$15, contrary to the statute," etc. On May 26, 1925, Judge Cammill, one of the judges of said criminal court, on Pihos' motion, quashed the indictment and Pihos was discharged. There was no trial on the merits of the indictment. In our Criminal Code, under the heading "Malicious Mischief" (Cahill's Stat. 1927, Chap. 38, pp. 917-8), is the following section:

"To Houses) Sec. 192. Whoever wilfully and maliciously destroys, injures or defaces any building or fixtures attached thereto, without consent of the owner * * shall be imprisoned in the penitentiary not less than one nor more than ten years: Provided, that where the damage done in such cases does not exceed \$15, the punishment shall be by fine not exceeding \$500, or by imprisonment in the county jail not exceeding one year, or both, in the discretion of the court."

After reviewing the evidence contained in the present transcript we are of the opinion that the verdict is manifestly against the weight of the evidence on the essential questions of want of probable cause and of malice on the part of defendant (Stern) in instituting and prosecuting the criminal proceeding as above detailed against plaintiff (Pihos), and that the judgment appealed from cannot stand.

581,

In Gleann v. Lawrence, 280 Ill. 587, it is said: "If malice and want of probable cause do not concur the action cannot be maintained, and it was for the plaintiff to show that there was not

probable cause nor reasonable ground for the prosecution." (Citing Israel v. Brooks, 23 Ill. 575, 576.) In McClurey v. Catholic Press Co., 254 Ill. 290, 294, it is said: "The existence of malice did not tend to prove a want of probable cause, for although malice may be inferred from a want of probable cause, the absence of probable cause cannot be inferred from malice." (Citing Brown v. Smith, 83 Ill. 291, 293.) This holding in the McClurey case is approved in the Lawrence case, supra. In Harpham v. Whitney, 77 Ill. 32, 42, the term "probable cause" is defined "as such a state of facts, in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion that the person arrested is guilty. * * It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution." Subsequently the same definitions of the term are contained in subsequent cases decided by our Supreme Court, including the Lawrence case, supra. We think that the evidence in the present case discloses that defendant had reasonable grounds for the belief that plaintiff (Pinos) was guilty of the criminal offense mentioned in the statute above quoted, in that Pinos had wilfully and maliciously injured and defaced the building in question. When on the morning of November 26, 1924, he arrived in front of the restaurant in said building and found the door securely fastened and padlocked, he nevertheless, by means of a wrench, forcibly and unlawfully effected an entrance into the restaurant, over the vigorous protests of defendant's agent, Plotnick, and in so doing broke locks and other fastenings and ripped off portions of the door jamb and injured and defaced the building. Subsequently on the same day, over the objections of defendant and Mathias, he caused some men employed by him to forcibly rip off from the walls of the restaurant certain panels and thereby further injured and

defaced the building.

And we think that the judgment cannot be sustained for another reason. It clearly appears from the evidence that defendant, in instituting and prosecuting the criminal proceeding against Fines, at all times relied and acted upon the advice of his attorney, Mathias, who was acquainted with all of the essential facts, and who was a reputable lawyer of high standing at the Chicago bar. In Glenn v. Lawrence, 280 Ill. 551, 589, it is said: "The prosecutor may act upon the judgment of reputable counsel, and if he makes a full, fair and truthful statement of the facts within his knowledge and such counsel advises him that there is probable cause for a criminal prosecution, such advice constitutes a complete and absolute defense." (Citing Picker v. Hotchkiss, 62 Ill. 107, 110, and Anderson v. Friend, 71 Ill. 475, 479.)

The judgment of the superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

THE UNIVERSITY OF CHICAGO

AND THE CHICAGO SCHOOL OF THEOLOGY

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33558

NORA WILLIAMS,
Appellee,

vs.

CHICAGO CITY RAILWAY
CO. et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries sustained by plaintiff late in the afternoon of October 20, 1927, while she was alighting from a southbound street car at the intersection of South State and 29th streets, Chicago, there was a trial before a jury in October, 1928, resulting in a verdict and judgment in her favor for \$2500, and defendants appealed.

Plaintiff's declaration consisted of two counts, in each of which are averments that on the afternoon mentioned ~~she~~, a passenger on one of defendants' cars which was standing at the intersection mentioned, was attempting in the exercise of all due care to alight from the car, of which fact the defendants by their servants had or should have had knowledge. In the first count it is charged that defendants by their servants "did then and there negligently and carelessly operate and control said street car, thereby causing plaintiff to be violently thrown to the ground" and injured, etc. In the second count it is charged that defendants by their servants "did negligently and carelessly start or cause to start the street car, to-wit, suddenly and without warning," whereby plaintiff was injured, etc. Defendants pleaded the general issue.

Plaintiff, an unmarried woman of about 48 years of age, was employed in domestic service in a northwest part of the city, earning \$9 per week. When the accident occurred she was on her way to her home, which was on South Dearborn street, near 29th street. All witnesses agree that the car came to a stop at the regular

THE
UNITED STATES
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, D. C.

MEMORANDUM FOR THE CHIEF OF STAFF

SUBJECT: [Illegible]

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stopping place just north of 29th street, that several passengers including plaintiff proceeded to alight, that the conductor of the car was standing at the regular place provided for conductors on the rear platform inside of an iron rail, and that plaintiff as she was in the act of alighting, fell from the step to the ground, was picked up, carried to the sidewalk and placed in a chair. She sustained a Colles fracture in the left forearm and received a severe shock and some bruises.

On the sole issue of fact, bearing upon the question of defendants' liability, viz., whether plaintiff's fall and injuries were negligently caused by the sudden and premature starting of the car, the evidence was conflicting. Plaintiff and two witnesses for her testified that the car suddenly started as she was alighting, and seven witnesses for defendants testified that the car did not move at all after it came to a stop at the crossing and while she and others were alighting. Plaintiff's two witnesses were Mrs. Martinez and Mrs. O'Connor. At the time of the trial and ^{prior} for several months/thereto, she, Mrs. Martinez and a Mrs. Blevins were living together at 2930 South Dearborn street. Mrs. Martinez testified that just before the car came to a stop she and Mrs. Blevins were standing at the "west corner of 29th and State;" that Mrs. Blevins was intending to board the car; and that after the car had stopped and just as plaintiff was getting off "the car jerked and started" -- going about six feet. Mrs. Blevins was not called as a witness. Mrs. O'Connor testified that she and a child of about 3 years of age were standing "on the northwest corner" near to where the car stopped; that, as plaintiff had her hand on the rod and went to step down "the car made a start and she fell;" that the car moved "about six inches, -- just a little piece;" and that "Mrs. Martinez came there after we had picked the lady up and sit her in a chair." Plaintiff testified: "The car stopped, all right, and, just as I

stepped down and went to bring the other foot down, the car started before I could get off; ** I fell; I didn't know anything else;** I was holding the rod and the car started; it just jerked like."

Three of defendants' witnesses were the conductor and motorman of the car and the motorman of another car which followed and had stopped about 15 feet from the rear of the car in question. Another witness was a passenger standing by a window on the front platform of said following car. Another witness, Charles Smith, head porter for two years at the Olympic Club, Cicero, living at 2825 South State street, and a passenger on the car in question, was just behind plaintiff as she was alighting. Another witness was Robert A. Taylor, a city police officer, who with a companion was seated in a "police flivver," a two-seated automobile, which had stopped to the west of the tracks and immediately north of the place where the passengers were alighting. Another witness was Albert Guines, proprietor of a soft drink parlor and cigar store. He was sitting in a chair on the sidewalk in front of his store on the west side of State street, about even with the rear platform of the car in question, after it had stopped. All observed the accident (except the motorman of the car in question) and all testified that the car did not move at all after it had stopped to let off passengers and until several minutes after the accident happened.

William Lawler, the conductor, testified that after the car had stopped he was standing on the rear platform looking toward the street; that as plaintiff was alighting she in some manner tripped and fell to the ground with her face to the west; that he got off the car, picked her up and assisted her to a chair which was on the sidewalk; and that as she lay there in the street and before he picked her up "she was about two feet west of the rear step." Charles Smith testified: "In getting off I was behind her."** She was getting off ** and somehow or other she slipped on something

and fell. ** The car remained standing still all the time." Robert A. Taylor, the police officer in the automobile, testified: "We had been following this car and when it came to 29th street it stopped and we stopped behind it. We were on the right side of the street.** We were four or five feet from the car, - very close to the rear.** Miss Williams was in the act of falling when I saw her. At that time the car stood still. ** From the time it came to a stop it remained standing until ^{after} the accident." Gaines testified: "I saw the lady fall. I was looking right at her when she fell from the car. When she fell the car was standing still.** When I first noticed her she was falling off the car. ** I don't know what she stepped on; I wasn't that close to her.** I had a chair out there. Every evening I sit out there. I have been in business there eight years."

In view of all the evidence, we are of the opinion that there is substantial merit in the main contention of defendants' counsel that, on the issue of defendants' negligence as charged in the declaration, the verdict is against the manifest weight of the evidence, requiring that the judgment be reversed and a new trial had.

This holding renders unnecessary any discussion in detail of counsels' further contentions (a) that the court erred in giving to the jury plaintiff's instruction No. 1; (b) in allowing in evidence certain testimony of plaintiff's expert witness, Doctor Tark (or Park), as to the probable permanency of the injury to plaintiff's arm; and (c) that the verdict is excessive. We may, however, say that we think that the portions of said physician's testimony complained of were too speculative to warrant admission in evidence. (See, Lyons v. Chicago City Ry. Co., 258 Ill. 75, 81-2; Kimbrough v. Chicago City Ry. Co., 272 id. 71, 76.) In the Kimbrough case it is said: "Here surmise or conjecture cannot be regarded as

proof of an existing fact or of a future condition that will result. Expert witnesses can only testify or give their opinion as to future consequences that are shown to be reasonably certain to follow.⁹

For the reasons indicated the judgment of the superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

33391

GEORGE K. FISKE and BIRGNE
HOLLERS, copartners as
GLENVIEW PLUMBING & HEATING
CO.,

Appellants,

v.

GLENVIEW STATE BANK,
a corporation,

Appellee.

254 LA. 603 3
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE ORRISLEY DELIVERED THE OPINION OF THE COURT.

On April 16, 1926, plaintiffs, as co-partners doing business as the Glenview Plumbing & Heating Co., commenced an action in trespass on the case against the defendant bank. In the declaration, consisting of one count, it is averred that defendant, "wrongfully, maliciously and falsely intending to injure and destroy the good name, reputation and credit of plaintiffs in their said trade and business," on April 3, 1926, and for several days thereafter, "falsely, fraudulently and maliciously endorsed" on certain of plaintiffs' checks which they had drawn upon it and which were made payable to third parties, "the words 'Acc't Garnisheed,' and returned said checks without payment to the several parties who had presented them for collection," whereby plaintiffs were greatly damaged, etc. To the declaration defendant filed a plea of the general issue. In January, 1929, by agreement of the parties, a jury was waived and the cause submitted to the court upon certain statements, made by respective attorneys of the parties, and upon certain documentary evidence introduced. The court found the defendant not guilty and entered

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OFFICE OF THE
ATTORNEY GENERAL
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TO THE HONORABLE
THE SENATE
WASHINGTON, D.C.
FROM THE
ATTORNEY GENERAL
JAN 10 1964
SUBJECT: [Illegible]
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judgment upon the finding against plaintiffs for costs and this appeal followed.

Upon the trial plaintiffs' attorney stated in substance that plaintiffs were and had been for several years co-partners under the firm name of Glenview Plumbing & Heating Co.; that in 1925, George K. Fiske (one of the plaintiffs) also was interested in and a director of the Advance Manufacturing Co., a corporation; that said corporation borrowed \$10,000 from the Milwaukee Western State Bank, giving to that bank its note, which was guaranteed by said Fiske and others; that the note was not paid at maturity; that subsequently the Milwaukee Western Bank commenced a garnishment suit in the Circuit court of Cook county, No. D-130,213, and entitled "George K. Fiske, for use of Milwaukee Western State Bank v. Glenview State Bank," and caused a writ of garnishment to be served upon the Glenview Bank on April 3, 1926; that for several years prior thereto the plaintiff co-partnership had had a bank account with the Glenview Bank; that on April 3, 1926, when said garnishment writ was served, the plaintiff co-partnership had on deposit in the bank to the credit of the co-partnership "several hundred dollars;" that at this time the plaintiff co-partnership was indebted to the Glenview Bank on a demand note, dated February 1, 1926, in a sum considerably in excess of said deposit; that immediately upon the service of the garnishment writ the Glenview Bank appropriated and applied said deposit to the indebtedness due to it from the plaintiff co-partnership upon the demand note, "leaving a balance still unpaid on the note;" that thereafter fifteen (15) checks of the plaintiff co-partnership, all drawn on the Glenview Bank and payable to various parties, were presented for payment at said bank, and payment was refused, and in each instance the bank caused to be written in pencil across

1. What is the purpose of the study?
 2. What are the research questions or hypotheses?
 3. What is the significance of the study?
 4. What are the limitations of the study?
 5. What are the conclusions?

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Figure 1. The effect of the initial concentration of the monomer on the polymerization of α -methylstyrene initiated by BuLi in THF at -78°C . The concentration of the initiator was 0.001 mol/L . The polymerization was terminated by the addition of methanol.

the face of each check the words "acc't Garnished," and the checks were returned unpaid. These checks were offered in evidence by plaintiffs and admitted, as were also five letters from some of the payees thereof addressed to plaintiffs, advising them of the return of the checks and requesting other remittances. Plaintiffs' attorney then stated that as a result of said checks being returned unpaid by the defendant bank, and so marked in pencil, "damage ensued to plaintiffs to the extent of several thousand dollars." No proof whatever as to the nature and extent of the claimed damages was offered by plaintiffs, beyond said statement that "damage ensued," etc.

During the making of a supplemental statement by the attorney for the defendant bank the demand note of the plaintiff co-partnership was offered and received in evidence without objection. It is dated "Glenview, Ill. Feb. 1, 1926" and signed "Glenview Plumbing & Heating Co., by Geo. K. Fiske." It states that "On demand next after date I, we, or either of us, jointly and severally as principals, promise to pay to the order of the Glenview State Bank, Glenview, Illinois, Twenty-Two Hundred (\$2200) dollars, for value received, payable at the Glenview State Bank, * * with interest from maturity at the rate of eight per cent per annum, with all costs of collection, including ten per cent attorney's fees. Above the signature are also the printed words:

"And each of us, whether maker or endorser, * * further wave demand, protest, and notice of demand, protest and non-payment.

Said bank is hereby expressly authorized to retain any general or special deposit, collateral, real or personal security, or the proceeds thereof, belonging to either of us, now or hereafter in the possession of it during the time this note remains unpaid, and before or after maturity hereof may apply the same to this or any other debt or liabilities of either of us to said bank, due or to become due."

On the back of the note are certain endorsements of payments - one of them being "4-4-1926, \$636.08" and showing "Balance due on

principal - \$1263.92."

Defendant's attorney, supplementing the statement of plaintiffs' attorney as above, stated that on April 3, 1926, and prior thereto the defendant bank was a creditor of the plaintiff copartnership, as evidenced by said demand note, in excess of the amount of the deposit to the credit of said co-partnership; that the bank, immediately upon receiving notice of the garnishment and "in accordance with the terms of said note," applied the funds on deposit in the bank towards its payment; that for several years prior to this time the business dealings between the bank and the plaintiff co-partnership had, as to the latter, been carried on by George E. Fiske, who was in charge of the latter's office and business and was the active financial man; that the Village of Glenview is a suburb of Chicago of approximately 1900 people at that time; that the defendant bank then employed two men - a cashier and an assistant cashier - and no others in its business; that said 15 checks, introduced in evidence, were marked in pencil, as stated, by one or the other of said employees and were returned unpaid through the usual channels; that this was done on Monday, April 5, 1926, when said checks were presented for payment, upon the advice of Arthur N. Wolfe, the bank's counsel; and that no other officer of the bank knew of said action.

In view of these statements, the documentary evidence, and particularly the provisions of said \$2500 note, we are of the opinion that the court's finding was fully warranted and that the judgment rendered thereon against plaintiffs should be affirmed. It is said in Knecht v. Beahold, 136 Ill. App. 430, 432; "The current of authority is uniform that a debt payable in money upon demand becomes due simultaneously with the making of the promise to

Polydora = *Syllis*

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pay, and that no actual demand for payment is needed." [See Howards v. German-Mexican Bank, 215 Ill. App. 164, 167.] It appears that on February 1, 1926, plaintiffs as copartners were depositors in the defendant bank; that on said date they as a firm were indebted to the bank in the sum of \$2200; that to evidence said indebtedness said firm by its managing member executed the note in question for said amount payable to the bank on demand; that by the terms of said note they waived any demand and they expressly authorized the bank at any time to retain any general or special deposit belonging to them and in the bank's possession and apply the same upon said indebtedness as evidenced by the note; that after the making of said note they continued to be depositors in the bank, and on April 3, 1926, they had on deposit in the bank to their credit as a firm "several hundred dollars," but less than the amount of their indebtedness to the bank as evidenced by the note; that on April 3, 1926, the bank was served with the garnishment writ; and that on the same day the bank applied said deposit in payment on said note as far as it would go, "leaving a balance still unpaid on the note." We think it clear that the bank had the right to make such application of the deposit. In Home National Bank v. Newton, 8 Ill. App. 563, 565, it is said: "It is a settled principle that where a depositor in a bank is indebted to the bank by bill, note, or other independent indebtedness, the bank has the right to apply so much of the funds of the depositor to the payment of his matured indebtedness as may be necessary to satisfy the same." In First National Bank v. Kelsey, 54 Ill. App. 660, it is decided that a bank having money deposited on call may apply the same to the payment of the demand notes of the depositor held by it, without first demanding payment of the notes. As we look at it the indebtedness of the plaintiff firm in the present case, as evidenced by said

demand note payable to the defendant bank, was due when said application was made. Even if it could be considered as not having matured, still the bank was authorized to make the application, for by the terms of the note any general or special deposit of said firm in the bank's hands could be applied by it upon said indebtedness, or any other indebtedness, "due or to become due." After the bank had made said application there was nothing on deposit with it to the credit of the plaintiff firm and it was legally justified in refusing to pay any of said 15 checks thereafter presented and in returning them unpaid. As to regard it as immaterial whether the checks when returned were marked across their face "Acc't Garnished" or "N.S.F." (not sufficient funds), as is usually done. The present record does not disclose any wrongful or illegal act on the part of the defendant bank for which it should respond in damages to the plaintiff firm. Furthermore, no evidence was introduced showing wherein or how much said firm had been damaged.

The judgment of the superior court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

33404

FRANK J. GAGEN,
Appellee,

v.

JOSEPH THINNES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for \$173, rendered by the municipal court of Chicago on January 31, 1929, in a fourth class action in tort following the verdict of a jury. It appears that on the afternoon of July 6, 1927, an automobile, owned and driven by plaintiff, collided with another automobile driven by Agnes Thinnes, a sister of defendant, in the intersection of Sheridan road and Touhy avenue, Chicago, and that as a result of the collision plaintiff's automobile was damaged to the extent of \$173. No brief has been filed by plaintiff in this appellate court.

In his statement of claim plaintiff alleged that on the day named he was operating his automobile with all due care and caution along and upon Sheridan road in a northerly direction at or near where said road is intersected by Touhy avenue; that defendant was "the owner of, and by his agent or servant in control of," another automobile which was being operated "in a westerly direction, turning from the east side of Sheridan road to go west on Touhy avenue;" and that defendant, by his agent or servant, so negligently and carelessly ran and operated his car that it ran into plaintiff's car, damaging it, etc.

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In defendant's affidavit of merits three defenses are set forth in substance, that at the time and place mentioned (a) defendant was not by himself or by any agent or servant in control of or operating the automobile that collided with plaintiff's automobile; (b) defendant was not guilty, nor was any agent or servant of his guilty, of any negligence, and (c) if plaintiff's automobile was damaged, such damage was occasioned by plaintiff's own negligence.

Upon the trial plaintiff called defendant as a witness under section 33 of the Municipal Court Act, and plaintiff was his only witness as to the details of the accident and the damage to his car. Defendant also testified in his own behalf and Agnes Thinnas for him.

Under examination by plaintiff's attorney under said section 33 defendant testified in substance that he was unmarried; that he lived at 7046 Northwestern Avenue, Chicago, with his mother; that two brothers and two sisters (including Agnes) also lived at that family home; that he was not the owner of the automobile that collided with plaintiff's automobile; that right after the automobile show in March or April, 1925, a Jordan sedan (the one in the collision) was purchased and thereafter kept "for family use;" that "my mother paid for the car;" that in 1927, when application was made for a license for the car for that year, he signed the application in his name, stating that he was the owner of the car; and that the reason he did this was that "my mother is up in years, doesn't get around very well and hasn't been feeling any too well."

When called as a witness in his own behalf defendant further testified that there were "two cars in the family," and that in addition to the Jordan car there was a "Chrysler sedan belonging to me," which he drove and controlled for his own use. He was asked

In testimony of this, the following was

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who, at the time he signed said application for license and for registration of the Jordan car, was the owner of that car, but the court, upon objection, would not allow him to answer the question. Nor was he allowed to testify who, at the time of the collision and prior thereto paid for the upkeep of the Jordan car. He further testified that he did not know who was driving the car or for what purpose at the time of the collision. He was not allowed to testify that his sister Agnes, at the time of the collision, was not driving the car for any purpose of his or under any directions from him. Agnes Thianes gave her version as to how the accident happened and testified that she at the time was driving the Jordan car; that six girls - one grown up besides herself - left her home to go to a bathing beach at the foot of Touhy avenue; and that her mother had requested her to take the children to the lake in the automobile. The objection of plaintiff's attorney to her testifying as to any directions received from her mother was sustained by the court. And she was not allowed to testify who at the time of the collision was the owner of the car, or who paid for its upkeep, or who controlled its movements.

We are of the opinion that by these rulings of the court defendant was not allowed to present to the jury competent evidence bearing upon the first of his defenses as set forth in his affidavit of merits and that thereby the court committed error, requiring a reversal of the judgment appealed from and the remandment of the cause. And we are further of the opinion, on the question as to plaintiff's contributory negligence in the driving of his automobile at the time and place, that the verdict is manifestly against the weight of the evidence.

The judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

33478

JOHN HANE,
Appellee,

v.

LOUIS WEAN,
Appellant.

25-11-006
F
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced in the municipal court of Chicago, there was a trial before a jury in December, 1926, resulting in a verdict and judgment against defendant for \$1,046, and he appealed.

On the first trial of the cause without a jury in November, 1927, there was a finding and judgment against defendant for \$516, but upon his motion that judgment was set aside and a new trial awarded.

Plaintiff is a contractor and builder and on April 6, 1927, he entered into a written contract with defendant whereby under certain stated provisions and conditions he agreed to perform certain enumerated repair work, and complete it free and clear from mechanics' liens as disclosed by waivers thereof on or before April 25, 1927, on two stores owned by defendant at Nos. 813 and 815 West 39th street, Chicago. The price for the work was \$1920. On April 15, 1927, the parties signed a second contract, whereby plaintiff agreed to perform certain extra work on one of the stores for the additional sum of \$400, and subject to all provisions and conditions of the first contract. The prices for both the original and extra work aggregate \$2320.

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THESE TWO FIGURES ILLUSTRATE THE PRINCIPLE OF THE METHOD OF SIMILAR FIGURES.

IN A TRIANGLE, IF A LINE IS DRAWN PARALLEL TO ONE OF THE SIDES, IT DIVIDES THE OTHER TWO SIDES INTO PROPORTIONAL SEGMENTS. THIS IS THE PRINCIPLE OF SIMILAR FIGURES.

EXAMPLE: IN THE TRIANGLE ABC, DE IS PARALLEL TO BC.

ON THE LINE AC, TAKE A POINT D, AND ON THE LINE AB, TAKE A POINT E, SUCH THAT DE IS PARALLEL TO BC. THEN, THE TRIANGLES ADE AND ABC ARE SIMILAR. THIS MEANS THAT THE RATIOS OF THE SIDES ARE EQUAL.

PROOF: SINCE DE IS PARALLEL TO BC, THE ANGLES ADE AND ABC ARE CORRESPONDING ANGLES, AND THEREFORE THEY ARE EQUAL. SIMILARLY, THE ANGLES AED AND ACB ARE EQUAL. SINCE TWO ANGLES OF THE TRIANGLE ADE ARE EQUAL TO TWO ANGLES OF THE TRIANGLE ABC, THE TRIANGLES ARE SIMILAR.

CONSEQUENCE: IF A LINE IS DRAWN PARALLEL TO ONE OF THE SIDES OF A TRIANGLE, IT DIVIDES THE OTHER TWO SIDES INTO PROPORTIONAL SEGMENTS. THIS IS THE PRINCIPLE OF SIMILAR FIGURES.

THESE TWO FIGURES ILLUSTRATE THE PRINCIPLE OF THE METHOD OF SIMILAR FIGURES.

In plaintiff's original statement of claim there were attached copies of the two contracts, and he alleged in substance that, immediately after the making of the first one he entered upon the work and continued in its performance until April 23, 1927, when defendant refused to allow him to further continue and to fully complete it, although he was able, ready and willing so to do; that on said date he had completed all of the work except the painting and the installation of a radiator and a toilet; that he received from defendant on account the sum of \$900; and that the net amount due from defendant, after making allowance for the incomplete work (\$199), is \$1221.

In defendant's affidavit of merits he denies that plaintiff had performed the work as agreed, or was prevented in any way from fully performing it, or that defendant was indebted to him in any sum. Defendant alleged that such work as plaintiff had performed had not been done in a good and workmanlike manner, or that mechanics' liens' waivers had been presented as agreed; that because of such faulty and unskillful work defendant had been obliged to employ another contractor, who had corrected and done over such faulty work and performed the uncompleted part of the work; and that because of this defendant had expended over and above the \$900 paid the sum of \$1250. He also filed a statement of claim of set-off in which, after making similar allegations, he also claimed damages in the sum of \$200, for loss in rents, because the work had not been fully completed within the time fixed by the contracts. His net claim against plaintiff was \$630.

After the first trial of the cause and after a new trial had been awarded, plaintiff by leave of court filed an amended statement of claim, which is substantially the same as his original statement of claim except that it contains additional allegations, or an additional count, in the nature of a quantum meruit claim against defendant for \$1221, and interest thereon. To said amended statement

of claim defendant, in April, 1928, filed an affidavit of merits in which he alleged inter alia, that although as provided in the contracts all of the work was to have been completed by April 25, 1927, the same was not then completed; that on April 26, 1927, plaintiff informed defendant that he was unable to complete the work owing to "lack of funds," and requested defendant to furnish him with \$900 "with which to complete the work;" that thereupon defendant advanced to plaintiff by check said sum "upon the express understanding that plaintiff would immediately put ten extra men on the job;" that plaintiff, after causing the certification of the check, refused to proceed further with the work with either ten or any men; that, as a result, defendant was obliged to and did hire "other people" to complete the unfinished work; that plaintiff did not present any waivers of lien of sub-contractors or material men; and that defendant is not indebted to him in said sum of \$1821, or in any sum.

Then said second trial was had defendant's claim of set-off, and plaintiff's answer thereto, were still on file. Upon the issues as to plaintiff's claim, and as to defendant's claim of set off, both parties testified and their testimony was supplemented by that of other witnesses called by them respectively. The jury by their verdict found the issues "on plaintiff's statement of claim and defendant's set-off against defendant, and assessed plaintiff's damages at the sum of \$1,046."

After reviewing all of the evidence, which it will serve no useful purpose to discuss in detail, we are of the opinion that the jury were fully warranted in disallowing defendant's claim of set-off; and that it was shown by a preponderance of the evidence that plaintiff substantially completed the work called for by the contracts, that full completion thereof was prevented by acts of

[illegible][illegible][illegible]

defendant, that defendant waived the provision requiring full completion by April 28, 1937, that waivers of lien by subcontractors were procured and presented to defendant, and that, in addition to the \$900 received, plaintiff was entitled to recover a considerable sum on his quantum meruit claim. There was evidence tending to show that some of the required work was not performed by plaintiff in a good and workmanlike manner, necessitating additional work to be done by another contractor, hired by defendant for that purpose. It is apparent from the jury's verdict of \$1,046 in favor of plaintiff, that an allowance for this faulty work was made by them. But we think that under all the evidence an allowance in an additional sum, viz, \$300, should have been made, and that the verdict and judgment in plaintiff's favor is excessive to the extent of \$300. The evidence also disclosed that some of the work done by said other contractor, and for which he was paid by defendant, was work which plaintiff had not contracted to do but was new and separate work. Defendant's counsel also contend that the judgment appealed from should be reversed because of errors in admitting certain evidence offered by plaintiff, and in refusing to give to the jury certain instructions offered by defendant. We do not think there is any substantial merit in either of these contentions.

Accordingly, if within 10 days plaintiff files in this court a remittitur of \$300, the judgment against defendant will be affirmed for \$746; otherwise it will be reversed and the cause remanded to the municipal court for another trial. In the event a remittitur is filed, no costs will be taxed against either party.

AFFIRMED FOR \$746 on REMITTITUR OF \$300;
OTHERWISE REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

33328

NATIONAL BOND & INVESTMENT CO.,
a corporation,

appellee,

v.

MANUEL A. COHEN,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, National Bond & Investment Company, a corporation, plaintiff, obtained a judgment by confession against Manuel A. Cohen, defendant, in the sum of \$920.70, on a promissory note executed by the defendant and made payable to the order of Clarke Motor Sales and by the latter indorsed, without recourse, to the plaintiff. Thereafter, on motion of the defendant, supported by affidavit, the judgment was opened up and leave was granted him to appear and make defense. The case was tried before the court, with a jury, and at the conclusion of all the evidence, on motion of the plaintiff, the court directed the jury to return a verdict in favor of the plaintiff in the sum of \$920.70. Judgment was entered on the verdict and this appeal followed.

The defendant contends that the note and a conditional sales contract executed in connection therewith constitute and are to be construed as one instrument, and that the recital in the note with reference to the contract prevents the note from being a negotiable instrument. We are unable to agree with this contention. The following is the note in question:

"Illinois Conditional Sale Contract Note
R & L

Chicago, Illinois, May 8th, 1926

\$1116.00

For value received I promise to pay to the order of Clarke Motor Sales (Seller) Eleven Hundred Sixteen Dollars (\$1116.00) at the office of National Bond & Investment Co., 165 North LaSalle Street, Chicago, Illinois, in installments as follows, viz.: Ninety Three Dollars (\$93.00) on the 15th day of June 1926 and a like amount on the 25th day of each month thereafter until the entire sum is paid, together with interest thereon at the rate of seven per cent per annum after maturity until paid.

And the undersigned and each of them hereby authorize irrevocably any Attorney of any Court of Record to appear for the undersigned and each or any of them in such Court in term time or vacation after any installments of this note become due, and confess a judgment without process in favor of the holder hereof, for the amount then due hereon, together with costs of suit and 10% attorney's fees and to release and waive all errors that may intervene and consent to immediate execution thereon.

The endorers and guarantors hereon hereby severally waive presentment for payment, notice of non-payment, protest, and notice of protest, and diligence in bringing suit against any party hereto, and consent that time of payment may be extended after maturity from time to time without notice thereof.

This note is given in conformity with the provisions of a conditional sale contract executed by the maker of this note on the date hereof.

Mail Address 1400 E. 47th St. (Signed) Mandel A. Cohen
Chicago, Illinois (Purchaser)

13 Mio 11

R & L Time Payment Plan"

Indorsed: "Without Recourse Pay To The Order National Bond & Investment Com. Chicago, Illinois Clarke Motor Sales J. M. Clarke.
(Italics ours.)

An instrument is not rendered non-negotiable merely because it contains a statement of the transaction out of which it arose, and a note like the one in question has been held to be a negotiable instrument in a number of cases. (See National Bond & Investment Co. v. Lannerg, 253 Ill. App. 262; Woodlawn Security Finance Corp. v. Doyle, 232 Ill. App. 28; Standard Trust & Savings Bank v. Cherry, 249 Ill. App. 653; Doyle v. Considine, 195 Ill. App. 311; Heber v. Keith Ry. Equipment Co.,

248 Ill. App. 358.) Moreover, section 3 of paragraph 23 of the Negotiable Instruments Act provides that "an unqualified order or promise to pay is unconditional within the meaning of this Act, though coupled with * * * 2. A statement of the transaction which gives rise to the instrument."

The defendant next contends there was evidence tending to prove that the "plaintiff was not a holder in due course and therefore subject to the same defenses that exist between payee and maker," and that the trial court erred in directing a verdict for the plaintiff. This contention is a meritorious one.

It appears in evidence that the automobile in question was owned by one Oscar Nysted who, about "the 10th or 15th day of April, 1926," placed it in the hands of the Clarke Motor Sales to sell, subject to his approval of the price; that theretofore, on February 6, 1926, Nysted had given a chattel mortgage on the automobile to the First Acceptance Corporation, in the amount of \$2,821.35, which was duly recorded on February 20, 1926; that on August 14, 1926, said corporation commenced replevin proceedings in the Superior Court of Cook County against the defendant et al. and on the same date the sheriff of Cook County replevied the automobile from the defendant and turned it over to the First Acceptance Corporation; that on January 9, 1928, there was a judgment entered in the said cause finding the right of property in the said corporation and ordering that it have and retain the property replevied. It appears that when the defendant bought the car in question, on May 3, 1926, Clarke represented to him that it was new and clear of all incumbrances. Clarke testified that the name of his business was "Clarke Motor Sales Company;" that he received the Pierce-Arrow car in question from

Oscar C. Nysted on April 10 or 15, 1926; that the car was not a new one; that he then told Mr. Ernest E. Binchart, the credit manager for the plaintiff, that he wanted to borrow \$1,200 on the said automobile; that Binchart told him to make out a regular conditional sales contract and draw a draft for \$1,200 on the plaintiff company, which he did, and that he delivered the conditional sales contract to the plaintiff company; that this transaction with the plaintiff company took place approximately two weeks prior to the transaction with the defendant; that he paid the said draft when he sold the car to the defendant. Mr. Binchart testified that on May 8, 1926, Clarke submitted to him the conditional sales contract between Clarke Motor Sales and Mandel Cohen and also the note in question, executed by the defendant; that at the same time Clarke gave him a written application to the plaintiff to discount the defendant's note; that the application was signed by the Sales company "By J. B. Clarke," and that across the face of the application the words "SECOND HAND" are stamped three times; that Clarke offered to sell the contract and note to the plaintiff company and he inquired if the company would purchase them; that the witness asked Clarke who Dr. Cohen was and that Clarke responded that he was a physician on the south side; that the witness then told Clarke to obtain a purchaser's statement from the defendant; that Clarke did so and gave the same to the witness (the statement was introduced in evidence and it contains (inter alia) the following: "for the purpose of inducing you to extend credit to me in connection with the purchase of a new automobile, I hereby represent"), etc. (italics ours); that the statement was made on a form of the plaintiff company that it furnished to Clarke; that the plaintiff company made independent investigations as to the

financial responsibility of the defendant; that thereafter the witness called Clarke on the 'phone and approved the transaction and told him that the company would buy the Cohen note and contract; that Clarke drew a draft for \$1,000 on the plaintiff company and sent it the note and contract; that from said written application of Clarke and other papers and the note, and from the investigation made by the plaintiff, he knew the nature of the transaction between Clarke and the defendant; that six days elapsed between the execution of the note in question and the payment of the money by the plaintiff that the plaintiff made no inquiry as to whether or not there was any chattel mortgage on the car; that he knew the car sold the defendant was a 1925 car; that the note in question and the conditional sales contract between Clarke Motor Sales and the defendant have been the property of the plaintiff since it purchased them from the Motor Sales; that the term "R & L Time Payment Plan" on the note of the defendant "is the name of the National Bond & Investment Company time payment plan. R is for Mr. Rothschild, the president of the company, and L is for Little, the secretary of the company. That is the name used by the National Bond & Investment Company in connection with its time payment plan." In the examination of this witness the following occurred: "Q. Did you ever hear of the fact that there is a concern here in Chicago that keeps a record of all automobiles by their mortgage, by the name of the car and number of the car? A. Not all automobiles. I know of several organizations that claim they keep these records, but their records are not complete. Q. Do you use that service? A. We use all kinds of service. Q. Did you use that service in this case? A. Well, we obtained a credit report on Mr. Cohen, the purchaser, and we knew Mr. Clarke, the dealer. Q. You didn't make any inquiry about whether or not there was any mortgage on this car? A. No."

That the defendant could have pleaded failure of consideration, had the Clarke Motor Sales sued him on the note is, of course, not disputed. Our Supreme Court has said that the question as to whether or not a plaintiff is a holder in due course is sometimes very difficult to determine and that each case must rest on its own facts and circumstances, and that a reasonable rule to follow is, Were the known facts and circumstances in a given case sufficient to put the plaintiff on inquiry, so that if inquiry had once been instituted it would have led to a full knowledge of the entire transaction between the maker and the payee of the note. Paragraph 72 of the Negotiable Instruments Act provides:

"Par. 72. Holder in due course, defined.) § 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Paragraph 76 provides:

"Par. 76. What constitutes notice of infirmity.) § 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

We are satisfied that under certain facts and circumstances in this case the question as to whether or not the plaintiff was a holder in due course should have been submitted to the jury to determine, and that the trial court erred in directing a verdict for the plaintiff. As we read the record the trial court assumed that when he held that the note in question was a negotiable instrument the entire defense fell, and undoubtedly his action in

THE UNITED STATES OF AMERICA

Washington, D.C. The President of the United States has the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

Very respectfully,
The President

Enclosed for you are two copies of the report of the Commission on the Administration of the Government, which was submitted to the President on the 10th inst.

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sustaining the objection of the plaintiff to certain competent evidence offered by the defendant was based on that erroneous assumption. The plaintiff, in its brief, has made but a very feeble answer to the instant contention of the defendant, as this case will probably be tried again, we expressly refrain from commenting on the effect of the evidence tending to prove that the plaintiff was not a holder in due course.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

33342

JAMES H. HOOPER and B. T. SNOW,
Bailliff,

Plaintiffs,

v.

CELLE BECKER and AMERICAN SURETY
COMPANY OF NEW YORK, a corporation,
Defendants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

JAMES H. HOOPER,

Appellant.

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of the first class, James H. Hooper and B. T. Snow, Bailliff, sued Cella Becker and American Surety Company of New York, a corporation, upon an injunction bond given by Cella Becker, as principal, and American Surety Company, as surety, in a certain cause in equity brought in the Circuit Court of Cook County by said Cella Becker against James H. Hooper and Bernard T. Snow, Bailliff of the Municipal Court of Chicago. The case was tried before the court, with a jury, and at the conclusion of the evidence the court directed a verdict for the defendants and entered judgment upon the verdict. James H. Hooper, alone, appeals.

The amended statement of claim alleges that the defendant Becker was, on February 6, 1926, the owner of lots 10, 11 and 12 in Block 2 in Cochran's Addition to Ridgeway; that on the said date Broadway-Heridon Building Co. obtained a judgment for \$700 against her; that on February 8, 1926, an execution was issued thereon, and on April 21, 1926, under said execution the

bailiff "sold all interest of said Becker" to plaintiff Hooper for \$749.25; that the period of redemption expired on July 21, 1927; that the property was not redeemed and plaintiff Hooper was entitled to a deed thereon, and to all the rents from July 21, 1927, or as soon thereafter as a bailiff's deed might issue, and demand be made upon the tenants for possession after the deed had been issued; that on September 2, 1927, said Becker filed a bill for injunction in the Circuit Court of Cook County and procured an injunction restraining said Hooper from obtaining a deed; that an answer was filed and a trial had, and on April 3, 1928, the court entered a final decree dismissing said bill of complaint for want of equity at complainant's costs; that said decree in legal effect dissolved the injunction; that said injunction had been issued upon the filing by said Becker of an injunction bond in the sum of \$1,500; that said defendants, on September 2, 1927, entered into and executed said injunction bond (a copy of which is filed in this case as the instrument sued on); that said injunction bond was approved before the injunction was issued; that by reason of said injunction plaintiff Hooper was prevented from securing a bailiff's deed and from demanding possession from said tenants and from receiving the rents for said premises from September 2, 1927, to April 13, 1928; that the monthly rental of said premises was more than \$4,000 per month, and said rents for said period were collected by said Becker and converted to her own use, and that she converted to her own use more than \$1,500, which amount plaintiff has been damaged, wherefore plaintiff asks judgment for \$1,500 debt and \$1,500 damages. The amended affidavit of merits avers (inter alia)

"That said Cella Becker was at all times mentioned in plaintiff's statement of claim, the sole legal owner, and in sole, legal and undisputed possession of the property and premises described in plaintiff's statement of claim, has been such sole, legal owner, and in such

sole, legal and undisputed possession of said property for the past four years, and now is such sole, legal owner and possessor of the said property.

"Affiant further states that said property and premises consist of an 18-apartment building, one of which apartments containing six rooms has been the home, and the only home, of said owner and her family, ever since she purchased the building, and now is the home, and the only home, of said owner and her family, and the other apartments have been at all times mentioned in plaintiff's statement of claim, occupied by tenants holding leases from said Cella Becker, and are now occupied by such tenants.

"Affiant further states that about April 21, 1928, under an execution issued by the Municipal Court of Chicago on a judgment entered against said Cella Becker, by confession on an alleged lease, in the sum of \$700.00, the Bailiff of said court did offer said property for sale, and plaintiff having bidden the sum of \$749.85 the whole of said property was struck off and sold to him, and the Bailiff thereupon issued a certificate of said sale to said purchaser, a copy of which was recorded in the office of the County Recorder of Cook County, Illinois, but said certificate was null and void, for the reason that the sale evidenced thereby was made on a bid of less than \$1000.00, contrary to the provisions of Section 9 of Chapter 52 of the Statutes of Illinois.

"Affiant further states, that, in the making of the aforesaid sale of said property, both the judgment creditor and the Bailiff of said court failed to comply with the Statutes of the State of Illinois, in that they did not make any appraisalment of said property, or take any steps to set off the homestead of the said owner, or offer to pay her \$1000.00 in lieu of said homestead, as provided by section 10 of said Chapter 52.

"That by reason of the fact said sale was entirely null and void said plaintiffs were not entitled to a deed to said premises and were not entitled to make a demand for possession of said premises and were not entitled to rents, profits and issues therefrom and were not damaged in the manner and form alleged in their statement of claim."

The undisputed evidence shows that the building in question is a single structure and consists of eighteen apartments, occupying a corner plot of ground in the City of Chicago; that since the defendant Cella Becker purchased the property, in January, 1914, she had occupied six rooms of the building as a home for herself and her family and that it was her only home; that at the time of the sale in question no steps were taken for the appraisalment of the property nor to set off the homestead therein, and that the real estate was sold as one parcel.

That the sale upon which the plaintiff Keoper depends was void is clear, see Palmer v. Riddle, 197 Ill. 48. Other cases to the same effect might be cited. The plaintiff Keoper contends that "a sale on execution without setting off the homestead is not void, as the Court may exercise its equitable powers to adjust the rights of the parties by either setting off the homestead or advancing the amount of the exemption to the judgment debtor." In support of this contention the said plaintiff cites Diets v. Haglar, 309 Ill. 381, 384, wherein it is said: "The law is well settled that the purchaser on execution of land worth more than \$1000, in which the judgment debtor has an estate of homestead, without setting off the homestead, as required by the statute, gets no title which is available in a proceeding at law for the possession of the premises, because the court of law cannot determine how far the homestead right will extend. (Hartwell v. McDonald, 69 Ill. 293; Nichols, Shepard & Co. v. Spremont, 111 id. 681; Palmer v. Riddle, 197 id. 48; Klosowski v. Klosowski, 286 id. 368.) It is equally well settled that such a purchaser does get an equitable title to the excess in value of \$1000, which he may go into a court of equity and enforce by having a homestead of that amount set off to the judgment debtor, or, if that is impracticable, by paying him \$1000. (Leomin v. Gerson, 62 Ill. 11; Leupold v. Kranz, 95 id. 440; Krapp v. Brand, 200 id. 403; Hayne v. Drury, 295 id. 533.) On application of the judgment debtor to set aside such a sale a court of equity may cause the homestead to be set off if the property is divisible and set the sale aside as to the homestead so set off, only, or, if the property is not divisible, may require the debtor to accept \$1,000 for his homestead if the purchaser shall elect to pay it. (Stevens v. Hollingsworth, 74 Ill. 302; Kilmer v. Garlick, 185 id. 406; Olp v. Meyer, 277 id. 202.)" It is a sufficient answer to the

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present contention to say that there is nothing in the record to show that the plaintiff Hooper has ever gone into a court of equity to have the homestead set off or to require the defendant Becker to accept \$1,000 for her homestead.

The plaintiff Hooper contends that the measure of damages in the present case "is the rental value of the premises, or if rents were collected by the one who obtained the injunction, then the measure is either the rental value or the amount actually collected, at the option of the obligee in the bond." As the sale in question was void, the plaintiff Hooper was not entitled to possession of the premises nor to collect rents from the same.

In the reply brief of the plaintiff Hooper, he raises, for the first time, the contention that the defense that the sale in question was void could have been raised in the chancery proceedings and that as the bill in the said proceedings was dismissed for want of equity, that defense is therefore res adjudicata. It is quite clear that the plaintiff Hooper is in no position to raise the instant contention at this time. In the present proceedings the defendant Becker, in her affidavit of merits, set up as a defense that the sale in question was void. The plaintiff Hooper did not see fit to plead res adjudicata to that defense nor did he, at the time defendant Becker introduced her proof as to the alleged void sale, interpose the question of res adjudicata. Neither in the assignment of errors nor in his original brief did he raise that question.

The plaintiff Hooper contends that, in any event, he was entitled to a verdict and judgment for nominal damages. It is well settled that a new trial will not be granted merely to permit a party to recover nominal damages. (See Barnett, Jr. v. Hubbard, 248 Ill. App. 109, 110, and cases cited therein.)

The judgment of the Municipal Court of Chicago is affirmed.
AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

proposed amendment to say that such a motion is in order in any case where the majority of the members of the committee are in favor of it. The committee is in favor of the amendment and will report accordingly.

The committee has also considered the report of the committee on the subject of the proposed amendment to the constitution, and has decided to recommend that the amendment be adopted. The committee is in favor of the amendment and will report accordingly.

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33359

A. F. LEWIS,
Appellee,

vs.

KEYWOOD-WAKEFIELD COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCARLEIGH DELIVERED THE OPINION OF THE COURT.

A. F. Lewis, plaintiff, sued Heywood-Wakefield Company, a corporation, defendant, in an action in tort in the Municipal court of Chicago. There was a trial before the court with a jury and a verdict rendered finding the defendant guilty and assessing the plaintiff's damages at \$304.42. Thereafter, on motion of the defendant, a new trial was granted and the cause was set for trial for February 3, 1928. On April 4, 1928, a judgment, ex parte, was rendered against the defendant. On August 2, 1928, the defendant filed a motion in the nature of a writ of error coram nobis to vacate and set aside the said judgment. In support of the motion the defendant filed a sworn petition alleging that the cause was set for trial for February 3, 1928, and that when called for trial that day was held until February 6, 1928; that on the last date the cause was held on the trial call until February 7, 1928; that on the last date "the said cause was dismissed for want of prosecution at plaintiff's costs, and on the wrapper of said cause where the Clerk of the Court entered his original order in the said cause there appeared the following order stamped upon the said wrapper and placed there on the 7th day of February, 1928, as follows: 'Order of Court, Suit Dismissed for Want of Prosecution, Plaintiff's costs;'" that "Gordon A. Franklin, associated in the office of John A. Bloomington, attorney for the petitioner, was present in the Court on said morning and was informed by the Clerk of the Court of the dismissal

of the said cause and his attention called to the stamped order on the wrapper showing the cause was dismissed for want of prosecution;" that said Franklin "thereupon returned to the office of John A. Bloomington and entered on the office records of John A. Bloomington that the said cause was duly dismissed on the 7th day of February, 1928;" that "some time after 9:30 o'clock a. m. on February 7, 1928, and after the said Gordon A. Franklin had left the Court Room of Judge Neap before whom this case was pending on that date, someone scratched out the order of Court which appeared on the outside of the wrapper in the said cause, and which was the original entry of dismissal and thereafter on the 4th day of April, 1928, without notice to your petitioner, a judgment was entered in said cause for the sum of Three Hundred Five and 79/100 (\$305.79) Dollars." To the petition was attached a photostatic copy of the wrapper in the said cause, which shows the following notations:

"A. F. Lewis
Versus
Keywood-Wakefield Co. a Corp.
JURY
TORT
FILES OF
THE
MUNICIPAL COURT
OF
CHICAGO

Docket No. 1447784
Sep. 19 - 27
Oct 18 - 27
Oct 25 - 27
Dec 15 - 27
Jan 5 - 28
Feb 3 - 1928
~~Order-of-court-wait-dismissed-for~~
~~want-of-prosecution-plaintiff's-cost.~~
Mar 15 - 1928"

The defendant also filed, in support of the petition, an affidavit of Thomas Black, the minute clerk in the court in question, in which the affiant avers that on February 7, 1928, "I stamped on the file cover in case #1447784, Lewis vs. Keywood-

Wakefield a rubber stamp impression reading "Order of Court, suit dismissed for want of prosecution, plaintiff's costs;" "that this order was stamped thereon and pursuant to the direction of the court who entered such order at that time;" "that thereafter at the direction of the court he ran a pen through the order of the court, but has no recollection as to the reason for so doing other than that it was at the direction of the court." In the answer to the petition, the plaintiff admits "that on the outside of the folder in which the papers and pleadings in said suit were contained, there appears a mark through which a pen has been drawn to the effect that the suit was dismissed for want of prosecution;" that on February 3, 1928, on account of the number of cases "appearing first on the call ready for trial, the said suit was by order of the court passed or held until the following court day and on February 9th was continued to March 16th;" that he believes that some person representing the attorney for the defendant appeared when the suit was continued to March 16, 1928; that "the petition here filed discloses a total lack of diligence on the part of said Denahy or the attorney of record for the defendant in not returning to the courtroom or examining the file in the suit to determine whether an order of dismissal for want of prosecution was entered in the cause;" "that no order of any kind appears on the half sheet or other record kept by the said clerk to the effect that said suit was dismissed on February 7, 1928, and that the stamped memoranda of dismissal appearing on the folder or wrapper in which said suit and record are contained does not constitute a legal or valid order in said cause."

In the examination of the witness Black, on the hearing of the motion to vacate the judgment, the following occurred:

"Q. I am handing you an envelope of Booket 1447784, A. F. Lewis vs. Keywood-Wakefield, in the municipal court of Chicago, the original

file, and ask you if those entries and the docket number 1447784 are in your handwriting? A. They are. Q. Did you make them at the time they purport to have been made? A. I did. Q. Now, just when did you make those entries; at the time, or after, or before the order was entered? A. At the time the order was entered, yes, sir. Q. This is the first memorandum of entry? A. That is the first memorandum of entry, yes, sir. Q. Of what the court ordered in this case? A. On the record, yes, sir. Q. What was your custom with reference to entering your order on the half-sheet; did you do that immediately, or simply wait until it was convenient for you to do that? A. It was not done immediately in all cases; sometimes it might be done later during the day.*** Q. That was your entry in all cases up to the time you made the entry on the half-sheet; that was the only memorandum you had of the order of the court; is that correct? The Witness: A. That is correct. *** The Court: Just a minute. Just read what the entries are. The Witness: There are various dates on it. This case was set for trial first on September 19, 1927; October 18, 1927; October 25, 1927; December 18, 1927; January 8, 1928; February 3, '28; and then there is a rubber stamp which reads 'Order of Court, suit dismissed for want of prosecution; plaintiff's costs,' which is cancelled. *** Q. You mean a pen scratch has been run through it? A. A pen scratch run through it. Q. Did you do that? The Court: Who did it? The Witness: Well, I can't say who did it, but I am of the opinion that I did it myself. Q. And then the subsequent order; read that to the Court. The Witness: March 16, 1928.*** Q. Was there any other place from which an attorney could get information regarding an order in his case or the disposition of it, other than that memorandum that you made on the corner before you had transmitted it to the half-sheet? The Witness: A. No, I think not." The witness further testified

similar to that of Kadden v. City of Chicago, 305 Ill. 200. If there appeared that on the general call of the calendar the case was stricken under a rule of court when plaintiff's attorneys did not appear and make known their request for trial. Such a request was made to the clerk but not correctly noted by him. After having been assured by the clerk that the request was understood plaintiff's attorneys left and were not present when the case was called. It was not only held to be such a mistake of fact as comes within the purview of said section, but the attorneys were warranted in assuming that the cause would be placed on the trial calendar and tried in due course by reason of the clerk's assurance. That the present case came up on the trial call and not under rules pertaining to a general call presents no valid distinction in principle between this case and that. The clerk is an officer of the court and it is his duty to note its orders that are to be subsequently spread of record. He was the proper one to consult as to the status of the case and was supposed to know and note the orders of the court, and we think plaintiff was warranted in relying upon his statement as to what they were and was not required to verify the same by consulting his minutes. The clerk, however, was mistaken and here as in the Kadden case misled the plaintiff and indirectly the court. We think, therefore, the case was properly reinstated." (Italics ours.) In Helbrook v. Lawton, 207 Ill. App. 497, it was held that a motion lies to vacate a judgment by a writ of error coram nobis where a Circuit Court clerk fails to obey a rule of court requiring him to place upon the wrapper of a case the name of the judge to whom the case was reassigned, as the result of which a judgment by default is entered by a judge whose name is on the files and to whom it had been assigned at a prior time. In that case the court said: "The clerk's fault and misprision were in not changing the

assignment on the wrapper. A judge, as well as an attorney, may be misled by the fault of a clerk." The court further states: "The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court," and a number of Illinois cases are cited in support of this last statement. (See also Butterick Publishing Co. v. Goldfarb, 242 Ill. App. 798.)

The plaintiff contends that the defendant was guilty of negligence and therefore the judgment should be affirmed. There is no merit in this contention.

The plaintiff next contends that the petition did not allege a meritorious defense and that therefore the judgment should be affirmed. It is a sufficient answer to this contention to say that it is not necessary, in a proceeding like the present one, for the petition to allege that the defendant had a meritorious cause of action. Allegations which show that an error of fact has been committed are essential; but the question of the merits of the original action is not involved.

The order of the Municipal Court of Chicago of December 1, 1928, is reversed, and the cause is remanded with directions to the court to vacate the judgment order of April 4, 1928.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

33395

FLORENCE F. GILLIAM,
Appellant,

RICHARD F. GILLIAM,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Circuit Court of Cook County, Florence F. Gilliam, complainant, filed her bill for divorce against Richard F. Gilliam, defendant. Thereafter, upon leave of court, the defendant filed a lengthy demurrer, general and special in its nature. The chancellor apparently treated it as a general demurrer and entered the following order: "It is ordered that the said Demurrer be and the same is hereby sustained, and the complainant electing to stand by her said Amended Bill, it is ordered, adjudged and decreed that said Amended Bill be and the same is hereby dismissed for want of equity." This appeal followed.

The amended bill, after making the usual allegations as to residence, marriage and cohabitation and that the complainant had always faithfully performed her duties as a wife, alleges

"That the defendant is a man of violent, passionate and ungovernable temper and that on frequent occasions he addressed your oratrix with the most opprobrious epithets and used threats of violence and frequently choked and slapped your oratrix about the face and body, causing your oratrix great pain and suffering; that on, to wit, during the month of January, A. D. 1926, at the home of your oratrix, the defendant herein, Richard F. Gilliam, became so enraged because of an argument over a piece of real estate that he came into the bedroom of your oratrix with a gun in his hand and threatened the life of your oratrix and put your oratrix in fear of her life and that he then grabbed your oratrix about the neck and attempted to choke your oratrix, causing your oratrix great pain and suffering and causing your oratrix to become sore, lame, sick and disabled therefrom; that on or

about the 13th day of May, A. D. 1928, while the defendant and your oratrix were entertaining the defendant's friends, one Mrs. Hayward and Mr. and Mrs. Strain, the defendant herein became enraged at some statement made by your oratrix herein and grabbed your oratrix about the throat and choked her, causing your oratrix to faint and become sick therefrom; and that he has been continually nagging your oratrix so that her life with him on account of said nagging and other matters and things has become so miserable and unbearable that it became necessary for her own peace of mind and safety to live separate and apart from the defendant, and that your oratrix has, since the 7th day of September, A. D. 1928, lived separate and apart from the defendant without her fault.

Your oratrix further represents that on, to wit: the 13th day of January, A. D. 1929, at the home of your oratrix's mother and father, the defendant Richard W. Gilliam, beat, struck and twisted the arm of your oratrix so that the ligaments became strained and causing your oratrix great pain and suffering and requiring your oratrix to have her arm in a cast for a period of two (2) weeks thereafter."

The bill prays (inter alia) that the complainant be divorced from the defendant.

The sole question on this appeal is whether the complainant's amended bill states a good cause of action. In our judgment it does. The defendant argues that it appears from the allegations of the bill that "all acts of appellee up to September 7, 1928, have been fully condoned;" that after that date the complainant "was not exercising her conjugal or marital relationship. Therefore the alleged assault committed on her on January 13, 1929, was no breach of the 'conjugal relationship;'" "the marital relationship was in suspension" and "the acts of January, 1929, do not annul the previous condonation," and do not revive the old offenses "because it was not committed against the then existing conjugal relationship." In Lips v. Lips, 327 Ill. 39, 42, it is said: "The defense of condonation in a divorce suit, to be available to the defendant, must be set up by plea or answer. It is an affirmative defense and the burden of proof is on the defendant. (Klekamp v. Klekamp, 275 Ill. 98.) The court would have been warranted in not allowing the appellant to make this defense without having pleaded

it or averred it in his answer." While it may be conceded that if it should appear from an examination of a bill itself that the acts and conduct charged against the defendant have been condoned by the complainant, a demurrer will lie to such bill, it is obvious from an inspection of the instant bill that it is not obnoxious to a demurrer. The defendant cites, in support of his extraordinary argument that the alleged assault committed on the complainant on January 13, 1929, "was not a breach of the conjugal relationship," Atterberry v. Atterberry, 3 Ore. 224, 227. This case, of course, does not sustain the defendant's argument. It does hold that an assault, committed after the commencement of the suit, could not be considered as one of the grounds for the divorce. "Condonation is defined in the books as forgiveness, upon condition the injury shall not be repeated, and is dependent upon future good usage and conjugal kindness." (Farnham v. Farnham, 73 Ill. 407, 500.) 'The authorities hold that condonation is not so strict a bar against a wife as against a husband, inasmuch as she may find it difficult to quit the common domicile, and often submits through necessity. Hence, condonation on the part of the wife is not pressed with the same vigor as condonation on the part of the husband.' (Lubenstein v. Lubenstein, 171 Ill. 133, 136.) 'Forbearance to abandon him and sue, does not weaken her title to relief.' (Harrison v. Harrison, 20 Ala. 629, 646.)" (Doane v. Doane, 198 Ill. App. 387, 392.) Actual physical violence is not essential to breach condonation of acts of physical violence. (Farnham v. Farnham, supra.)

We are satisfied that the amended bill states a good cause of action and that the chancellor erred in sustaining the demurrer to the same, and the order of the Circuit Court of Cook County sustaining the demurrer to the amended bill and dismissing the bill for want of equity is reversed, and the cause is remanded with directions to the chancellor to overrule the demurrer to the amended bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

35435

KATHERINE WATT,
Appellee,

v.

MARSHALL FIELD & COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MCARLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of trespass on the case, Katherine Watt sued Marshall Field & Company, a corporation, Michael P. Ford and Edward S. McGuire. A jury was impanelled to try the cause and at the close of plaintiff's evidence the court instructed the jury to find the defendant Ford not guilty and the jury returned a verdict finding him not guilty. Later, by agreement, a juror was withdrawn and the cause continued. Thereafter a second jury was impanelled. The plaintiff dismissed the cause as to defendant McGuire. A verdict was returned finding the defendant Marshall Field & Company guilty and assessing the plaintiff's damages at the sum of \$10,000. The plaintiff remitted \$5,000 and a judgment against the said defendant for \$5,000 was entered. This appeal followed.

Each count of the declaration alleged an assault upon and false imprisonment of the plaintiff, on March 16, 1925, by the defendant Marshall Field & Company, by its then servants, agents and employees, Michael P. Ford, Loretta Katherine Conway and Edward S. McGuire.

The plaintiff was forty-five years of age and a waitress. On the afternoon of March 16, 1925, she entered the retail store of

Figure 1. The effect of the concentration of the *Ag* on the *Ag* adsorption capacity of the *Ag*-*Ag*2S-*Ag*2S2O3-*Ag*2S2O4-*Ag*2S2O6-*Ag*2S2O8-*Ag*2S2O10-*Ag*2S2O12-*Ag*2S2O14-*Ag*2S2O16-*Ag*2S2O18-*Ag*2S2O20-*Ag*2S2O22-*Ag*2S2O24-*Ag*2S2O26-*Ag*2S2O28-*Ag*2S2O30-*Ag*2S2O32-*Ag*2S2O34-*Ag*2S2O36-*Ag*2S2O38-*Ag*2S2O40-*Ag*2S2O42-*Ag*2S2O44-*Ag*2S2O46-*Ag*2S2O48-*Ag*2S2O50-*Ag*2S2O52-*Ag*2S2O54-*Ag*2S2O56-*Ag*2S2O58-*Ag*2S2O60-*Ag*2S2O62-*Ag*2S2O64-*Ag*2S2O66-*Ag*2S2O68-*Ag*2S2O70-*Ag*2S2O72-*Ag*2S2O74-*Ag*2S2O76-*Ag*2S2O78-*Ag*2S2O80-*Ag*2S2O82-*Ag*2S2O84-*Ag*2S2O86-*Ag*2S2O88-*Ag*2S2O90-*Ag*2S2O92-*Ag*2S2O94-*Ag*2S2O96-*Ag*2S2O98-*Ag*2S2O100-*Ag*2S2O102-*Ag*2S2O104-*Ag*2S2O106-*Ag*2S2O108-*Ag*2S2O110-*Ag*2S2O112-*Ag*2S2O114-*Ag*2S2O116-*Ag*2S2O118-*Ag*2S2O120-*Ag*2S2O122-*Ag*2S2O124-*Ag*2S2O126-*Ag*2S2O128-*Ag*2S2O130-*Ag*2S2O132-*Ag*2S2O134-*Ag*2S2O136-*Ag*2S2O138-*Ag*2S2O140-*Ag*2S2O142-*Ag*2S2O144-*Ag*2S2O146-*Ag*2S2O148-*Ag*2S2O150-*Ag*2S2O152-*Ag*2S2O154-*Ag*2S2O156-*Ag*2S2O158-*Ag*2S2O160-*Ag*2S2O162-*Ag*2S2O164-*Ag*2S2O166-*Ag*2S2O168-*Ag*2S2O170-*Ag*2S2O172-*Ag*2S2O174-*Ag*2S2O176-*Ag*2S2O178-*Ag*2S2O180-*Ag*2S2O182-*Ag*2S2O184-*Ag*2S2O186-*Ag*2S2O188-*Ag*2S2O190-*Ag*2S2O192-*Ag*2S2O194-*Ag*2S2O196-*Ag*2S2O198-*Ag*2S2O200-*Ag*2S2O202-*Ag*2S2O204-*Ag*2S2O206-*Ag*2S2O208-*Ag*2S2O210-*Ag*2S2O212-*Ag*2S2O214-*Ag*2S2O216-*Ag*2S2O218-*Ag*2S2O220-*Ag*2S2O222-*Ag*2S2O224-*Ag*2S2O226-*Ag*2S2O228-*Ag*2S2O230-*Ag*2S2O232-*Ag*2S2O234-*Ag*2S2O236-*Ag*2S2O238-*Ag*2S2O240-*Ag*2S2O242-*Ag*2S2O244-*Ag*2S2O246-*Ag*2S2O248-*Ag*2S2O250-*Ag*2S2O252-*Ag*2S2O254-*Ag*2S2O256-*Ag*2S2O258-*Ag*2S2O260-*Ag*2S2O262-*Ag*2S2O264-*Ag*2S2O266-*Ag*2S2O268-*Ag*2S2O270-*Ag*2S2O272-*Ag*2S2O274-*Ag*2S2O276-*Ag*2S2O278-*Ag*2S2O280-*Ag*2S2O282-*Ag*2S2O284-*Ag*2S2O286-*Ag*2S2O288-*Ag*2S2O290-*Ag*2S2O292-*Ag*2S2O294-*Ag*2S2O296-*Ag*2S2O298-*Ag*2S2O300-*Ag*2S2O302-*Ag*2S2O304-*Ag*2S2O306-*Ag*2S2O308-*Ag*2S2O310-*Ag*2S2O312-*Ag*2S2O314-*Ag*2S2O316-*Ag*2S2O318-*Ag*2S2O320-*Ag*2S2O322-*Ag*2S2O324-*Ag*2S2O326-*Ag*2S2O328-*Ag*2S2O330-*Ag*2S2O332-*Ag*2S2O334-*Ag*2S2O336-*Ag*2S2O338-*Ag*2S2O340-*Ag*2S2O342-*Ag*2S2O344-*Ag*2S2O346-*Ag*2S2O348-*Ag*2S2O350-*Ag*2S2O352-*Ag*2S2O354-*Ag*2S2O356-*Ag*2S2O358-*Ag*2S2O360-*Ag*2S2O362-*Ag*2S2O364-*Ag*2S2O366-*Ag*2S2O368-*Ag*2S2O370-*Ag*2S2O372-*Ag*2S2O374-*Ag*2S2O376-*Ag*2S2O378-*Ag*2S2O380-*Ag*2S2O382-*Ag*2S2O384-*Ag*2S2O386-*Ag*2S2O388-*Ag*2S2O390-*Ag*2S2O392-*Ag*2S2O394-*Ag*2S2O396-*Ag*2S2O398-*Ag*2S2O400-*Ag*2S2O402-*Ag*2S2O404-*Ag*2S2O406-*Ag*2S2O408-*Ag*2S2O410-*Ag*2S2O412-*Ag*2S2O414-*Ag*2S2O416-*Ag*2S2O418-*Ag*2S2O420-*Ag*2S2O422-*Ag*2S2O424-*Ag*2S2O426-*Ag*2S2O428-*Ag*2S2O430-*Ag*2S2O432-*Ag*2S2O434-*Ag*2S2O436-*Ag*2S2O438-*Ag*2S2O440-*Ag*2S2O442-*Ag*2S2O444-*Ag*2S2O446-*Ag*2S2O448-*Ag*2S2O450-*Ag*2S2O452-*Ag*2S2O454-*Ag*2S2O456-*Ag*2S2O458-*Ag*2S2O460-*Ag*2S2O462-*Ag*2S2O464-*Ag*2S2O466-*Ag*2S2O468-*Ag*2S2O470-*Ag*2S2O472-*Ag*2S2O474-*Ag*2S2O476-*Ag*2S2O478-*Ag*2S2O480-*Ag*2S2O482-*Ag*2S2O484-*Ag*2S2O486-*Ag*2S2O488-*Ag*2S2O490-*Ag*2S2O492-*Ag*2S2O494-*Ag*2S2O496-*Ag*2S2O498-*Ag*2S2O500-*Ag*2S2O502-*Ag*2S2O504-*Ag*2S2O506-*Ag*2S2O508-*Ag*2S2O510-*Ag*2S2O512-*Ag*2S2O514-*Ag*2S2O516-*Ag*2S2O518-*Ag*2S2O520-*Ag*2S2O522-*Ag*2S2O524-*Ag*2S2O526-*Ag*2S2O528-*Ag*2S2O530-*Ag*2S2O532-*Ag*2S2O534-*Ag*2S2O536-*Ag*2S2O538-*Ag*2S2O540-*Ag*2S2O542-*Ag*2S2O544-*Ag*2S2O546-

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1. The above information was obtained from the files of the Department of the Interior, Bureau of Land Management, and is being furnished to you for your information.

Marshall Field & Company and purchased a few Easter cards on the second floor and then went to the sixth floor and looked at some dresses in show cases in a small room. When she came out of that room she saw six or seven coats lying on an "exhibition chair." That occurred thereafter is a matter of dispute. The plaintiff testified that she picked up one of the coats and took it over to a mirror "to get the effect" and then turned around to put it back on the chair, when she was stopped by one Loretta Conway, who said to her: "What are you trying to do? Get away with that coat?" to which the plaintiff replied: "Who are you that you should approach me in this manner;" that Loretta Conway took the coat from her and took her down to the special service office of Marshall Field & Company, where she was searched and questioned. Loretta Conway was a special police officer of the City of Chicago, detailed to Marshall Field & Company's store under an arrangement between that company and McGuire & White Detective Agency, whereby that agency was to supply said company with sufficient help to protect the property of itself and its customers. The agency had the sole control of this help and directed and instructed them as to their duties. The defendant had nothing to do with the hiring or discharging of the said employees, and one of its defenses was, that, in any event, the alleged assault upon and imprisonment of the plaintiff was not committed by any of its servants or agents. A witness for the defendant, Mildred Bove, who was a clerk in its store, testified that she saw the plaintiff roll up one of the coats in a very small "package" and put it in her shopping bag, and then leave the cloak department and proceed to the State street elevators of the store, a distance of about one-half block, where, just as the plaintiff was about to take an elevator, she was stopped by Loretta Conway,

who took the coat from her. The plaintiff was then taken to the assistant superintendent's office. What occurred there is a matter of dispute. It is conceded that the plaintiff there gave her name as Elizabeth Walters. The defendant made proof to the effect that the plaintiff there admitted stealing the coat and that she gave as an explanation for her act that she was out of work and hard up. The plaintiff denied making these admissions and denied stealing the coat. On March 17, 1925, Loretta Conway presented an information to the Municipal Court in which the plaintiff (under the name of Elizabeth Walters) was charged with stealing a coat belonging to the defendant Marshall Field & Company. A short time later a jury in that court returned a verdict finding the defendant (plaintiff) not guilty. Loretta Conway died July 4, 1926.

The defendant has argued a number of contentions in support of its motion for a new trial, but in the view that we have taken of this appeal we deem it necessary to refer to only one.

The defendant strenuously argues that it did not have a fair trial, for the reason that "during the trial of this case the trial Court continually interrupted counsel, took over the examination of witnesses, asked leading questions, and did this to such an extent that the record and abstract are several times as long as they should be. It was necessary in making the abstract to quote the Court exactly in order to sustain our proposition that the conduct of the trial Court was such that the defendant did not have a fair trial. A reference to almost any page of the abstract will indicate that it was the Court who conducted the proceedings." We regret to state that this contention is clearly a meritorious one.

At the outset of the trial, while counsel for the defendant was making his opening statement, he stated that Loretta Conway was

a special police officer of the City of Chicago detailed to the defendant's store. At this point the court, of his own motion, made the following statement: "I am not going to allow that. No. You can't do that in this court, Mr. Landon. I know the whole situation and you can't do that. You are going to claim Marshall Field's didn't pay her." Thereafter the court continuously interrupted the counsel in his statement by questions and assertions that were highly prejudicial. The counsel again stated that Loretta Conway was a special police officer of the City of Chicago, and although no objection was made to the statement, the following occurred: "The Court: What do you mean? You mean she's a regular police officer? Mr. Landon: Special. The Court: What do you mean by special police? Mr. Landon: Appointed under the provisions of an ordinance of the City of Chicago whereby - The Court: Paid by whom? Mr. Landon: She was paid by the McGuire-White detective agency. The Court: That won't do. Don't talk to me about any special police. * * * Then you say she was paid by the McGuire-White detective agency. Who paid McGuire-White detective agency?"

Mildred Bove was a very important witness for the defendant. She was a saleslady in the cloak and suit department of the defendant. She had testified that the plaintiff came into the said department and looked at some coats that were on the backs of chairs and that she then rolled up one coat in a very small "package" and put it in a shopping bag that she carried and then closed the bag. At this point the following occurred: "The Court: Rolled the coat into the shopping bag? The Witness: Into the shopping bag, the other coat, - closed the shopping bag and deliberately walked away until finally Miss Conway happened to be in the section some way or other - I don't know where she came from - and she asked me if I wouldn't follow her, while she followed this party out, and she walked to the State street side

near the elevators - The Court: What was that you say she took?
A coat? The Witness: Yes. The Court: How large? The Witness:
Well, it's a spring coat, a little light spring coat. The Court:
How large? The Witness: Well, it's a regular size coat. The Court:
A woman's coat? The Witness: A woman's coat; yes. And she - of
course, Miss Conway asked her what she had in her bag. * * * The
Court: How large? The Witness: About that large. (Indicating.)
The Court: How large do you indicate? You are talking now about
wrapping up a coat and putting it into a bag. How large a bag? The
Witness: About that large. (Indicating.) The Court: Describe it.
The Witness: I don't know how to describe it. The Court: As large
as that? The Witness: Well, about - Would you say twelve feet, I
mean twelve inches, rather? One foot. The Court: Twelve inches
long. The Witness: Yes. And about the same width. Mr. Landon
(counsel for defendant): Then what occurred? The Court: Is that
the bag? There's some claim Marshall Field & Company had that bag.
Mr. Whiteside (counsel for the plaintiff): Yes, your Honor. Mr.
Landon: We haven't got it. I don't know. He said there's a claim
we have got it. I say we haven't the bag. Miss Conway, the police
officer, took that bag. The Court: What's become of it? Mr. Landon:
I don't know. * * * The Witness: She had the coat in the hand-bag.
It looked like a shopping bag. It was a dark bag. I presume it
was made of leather. I saw the coat. It was a dark coat, kind of
coffee colored. The Court: Is the coat here? Mr. Landon: No; we
haven't it here. The Court: What became of it? Mr. Landon: The
police took it over. The Court: But where is it? Mr. Landon: I
don't know. Well, we never got it back, as far as I know. It was a
plain tailored coat. Had a very little fur collar on it, a narrow fur
collar, no fur around it. I do not remember how it was lined. The
Court: I suppose that somebody will be here from some place, I

presume, that has knowledge of the coat, where it was taken to. * * *

The Witness: She took the other coat and rolled it on her knee to a small package and dropped that into the hand-bag. The Court: Was the bag open, did you see - The Witness: The bag was open. The Court: Did you see her open it? The Witness: It was open; yes. The Court: Did you see her open the bag? The Witness: Yes. The Court: When was it she opened the bag? The Witness: While she was looking at these coats before she placed it onto her arm. The Court: She opened the bag? The Witness: She opened the bag." The trial court then examined the witness as to her testimony in the hearing of the case in the Municipal Court wherein the plaintiff was charged with stealing the coat. The examination and cross-examination of this witness was practically conducted by the trial court, and the jury could have drawn no other reasonable conclusion from the examination and from the inquiries made by the court as to the whereabouts of the coat and the bag than that the court did not believe the testimony of Mrs. Bevo.

Nathaniel L. Crawford, assistant to the superintendent of the defendant's retail store, was also an important witness for the defendant. He was placed on the stand for the evident purpose of proving (inter alia) that the defendant did not cause the arrest or imprisonment of the plaintiff. The abstract shows that neither the counsel for the plaintiff nor the counsel for the defendant was given a reasonable opportunity to examine or cross-examine this witness, and that the court practically conducted the entire examination. During the examination the following occurred: "The Court: What became of the coat? The Witness: I don't know what became of that. The Court: Well, didn't anybody ever find out? Don't you know whether it ever went back to Marshall Field's or whatever became of it? The Witness: I don't know what became of it. I couldn't tell you. The Court: Well,

who could know? The Witness: I don't know that anybody would know. The Court: Sir? The Witness: I don't know who would know. The Court: Well, it was a valuable coat, wasn't it? The Witness: Worth \$50. The unfortunate part, I can't tell what has been done with it. * * * The Court: Did you hear Miss Conway tell McGuire in your presence that she, Miss Conway, had taken this out of the hand-bag? The Witness: Yes. The Court: Were you told by Miss Conway that Miss Beve, or whatever her name was, had seen her take the garment and roll it up and put it in the hand-bag? The Witness: She made - The Court: Were you told that? The Witness: She mentioned a saleslady. The Court: Were you ever told that? The Witness: Yes. The Court: You didn't send for the saleslady. The Witness: No, I didn't. The Court: Do you know whether she was a witness in the police court? The Witness: I don't know. I wasn't in the police court. The Court: Did you keep track of this case at all in any way? The Witness: I haven't personally, no. There was no necessity for me - The Court: After she (the plaintiff) refused to sign the statement and wouldn't sign it, had it occurred to you that it would be advisable to send for this saleslady to find out whether or not the statement of Miss Conway was in any way corroborated? A. That's taken care of by Sergeant McGuire. The Court: I asked you. The Witness: No, I did not. The Court: Well, it is your property, isn't it, the one you are talking about? The Witness: That is not my business. The Court: It is your property, Marshall Field's property, wasn't it? The Witness: Yes. The Court: Well, did it occur to you, Mr. Crawford, to send for Miss Beve, this saleslady, if it were true that Miss Conway had seen her take it out of the bag and that the saleslady had seen her put it in the bag to confront her with the person? Had that occurred to you, to send out for the saleslady? The Witness: That was already done by Ed McGuire. The Court: That was done by Ed

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McGuire? The Witness: The question you put to me. The Court: Well, did Miss Bevo come down there? The Witness: No; Miss Bevo didn't. Ed McGuire went up there. The Court: Did he take the plaintiff along? The Witness: No, he did not." The witness testified that the plaintiff was brought into his office and interrogated by McGuire and that at the request of the latter he wrote down on a piece of paper what the plaintiff said. The witness testified that the plaintiff then and there admitted stealing the coat and that she gave as an explanation for her act that she was out of work and hard up. The witness further stated that he wrote down on the piece of paper the admissions made by the plaintiff. At this point the following occurred: "The Court: Well have you got that statement? The Witness: I don't know where it is right now. * * * The Court: Then what happened after you wrote it up? The Witness: I gave it to Mr. McGuire. * * * The Court: What has become of that piece of paper? What was that written on? The Witness: Ordinary ruled paper. The Court: Do you know what became of it? The Witness: No, some of the lawyers had it at one time. I don't know what became of it. It was ordinary ruled paper, not written on a form blank. I last saw it in Judge Pam's court. When Miss Walters was brought in the office I was writing out an accident report. The Court: Don't make a speech about it."

Edward E. McGuire, called by the defendant, testified that he was a regular police officer of the City of Chicago and had been such for many years, and that for twenty years or more prior to the time in question he had been detailed by said city to watch pick-pockets and shoplifters in the State street department stores and that in the performance of his duties he made regular rounds of the said stores. The examination and cross-examination of this witness was practically conducted by the trial court. During the examination

the following occurred: The Court: What became of the hand-bag? We haven't got to any case. What became of the hand-bag and the particular garment? Mr. Landon: If you know. The Court: They were in your presence. The Witness: Yes. The Court: You took her to the patrol wagon, didn't you? The Witness: No; there wasn't any wagon ready, and I took her up in a taxi. The Court: You took her up here to the Harrison street police station. The Witness: Yes. The Court: Did you take anything with you? The Witness: Yes; the bag; the bag was kept in evidence until we were in - The Court: What did you do with it, is the question. The Witness: Put it in the custodian's office, the police custodian's office. The Court: Her bag. The Witness: The bag that was used - The Court: Well, the bag. The Witness: Yes. The Court: And the dress. The Witness: Yes. The Court: And the garment, whatever it was. Was it a dress or coat? Mr. Landon: Coat. The Court: Coat. And they were taken by you with her to the police station. The Witness: Yes. The Court: What did you do with them? The Witness: Kept them in the custodian's office until the last case here and we were under - I was under - I believed we wouldn't need it any more and I offered it to this woman to take it and she wouldn't take it. The Court: Offered what to her? The Witness: This lady here. The Court: Offered what. The Witness: Her own bag. The Court: There is the dress? The Witness: The dress? Sent it back to the store. The Court: Well, who has got it? The Witness: Marshall Field's got it. The Court: Who? What particular individual? The Witness: I don't recall who I give it to. Somebody in the office there, and told them we were through with it. The Court: Well, this lawsuit was pending. This lawsuit has been pending. You know that, don't you? The Witness: No, I didn't then. I thought it was over. The

Court: You thought this lawsuit was over. Very well. Mr. Landon: This lawsuit wasn't brought, if the Court please, until 1927. The Witness: No. The Court: At any rate, what became of the bag since you say you offered it to her? The Witness: I put it in the custodian's office and told them that the owner didn't want it, and they sold it, I presume. That's a year ago or more. The Court: They sold it. The Witness: I presume so. That's what they do if there's uncalled for goods. * * * The Court: Did you say you got the coat and turned it back to Marshall Field's? The Witness: That's my recollection. That's the course we took with other goods that's in evidence. The Court: The particular individual in Marshall Field's to whom you returned it, you don't recall. That would be the custom? That's the general way? The Witness: Leave it in the superintendent's office." The witness stated that he examined the plaintiff in the office of Mr. Crawford and that he requested the latter "to make a memorandum of what she said." At this point the following occurred: "The Court: Why did you ask Crawford to do it? Why didn't you do it yourself? The Witness: Well, he was a clerical fellow there; he was at the desk." During the cross-examination of this witness by the court, the following occurred: "The Court: Well, there was a trial of this lady for stealing that coat. The Witness: Yes. This case was up in another court. The Court: We are talking about Judge George where there was a trial. The Witness: I don't recall now. The Court: weren't you there? The Witness: Yes, I was there. I don't recall whether this - The Court: Bove - The Witness: Yes. My recollection is that this woman plead guilty. The Court: I didn't ask you that. * * * Wait a minute. This statement has been made here in the presence of the jury and, if that's ^a fact that this woman plead guilty, this lawsuit is over. Mr. Landon: Well, I don't understand that's the fact, if the Court please. The Court: Why

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does he state it? Mr. Landon: I don't know. He didn't state it as a fact; he didn't remember. The Court: I heard him say - The Witness: Your Honor when you asked me if I remembered that - Well, the clerk - The Court: Don't let's trifles with this thing. If you wish to withdraw that statement, then withdraw it. If you wish to stand by it, we will examine the record. The Witness: Well, I don't know. I am not positive now. I feel now that there was a finding of dismissal. The Court: What's that? The Witness: I had in my mind that she plead guilty and that the Court discharged her. That was my recollection. The Court: Well, now, listen, Mr. McGuire, - Mr. Landon: Now, if the Court please, I object. The Court: All right. Objection sustained. Then the answer stands. You want the answer to stand that she plead guilty? Mr. Whiteside (counsel for plaintiff): He didn't say, as I understand it, that she plead guilty. The Court: Read it. The Witness: I thought she did, your Honor. I know now that she didn't. The Court: How is that? The Witness: I know now that she didn't. But I had in my mind that she did. The Court: Oh! Then when you made the statement that you understood that she plead guilty, that was your impression at the present time. The Witness: Yes. The Court: But now you think you are wrong about it. The Witness: Well, it wasn't my impression just now but before this case came up I had it in my mind that she - The Court: Now, if that stands, then the record will be admissible which otherwise wouldn't. That's before the jury. The statement should not - Mr. Landon: If the Court please, I shall offer that entire record. The Court: No. There - What do you mean, the entire record? Mr. Landon: Of what occurred in the Municipal Court. The Court: No, that is not admissible. You know that is not admissible. The judgment of the Court, if at

all, might under certain circumstances be admissible. Mr. London: Well, if the Court please, you asked the witness - The Court: I knew, I asked him - Strike it all out. The jury will disregard the statement of the impression of the witness. It is not evidence. Strike it all out. Mr. London: Now, Mr. McGuire, in the room that day, Mr. Crawford was there all the time you were there, was he? Yes. Q. Did he at any time direct you to call the wagon? A. No; he hadn't anything to do with it. The Court: He didn't ask you whether he had anything to do with it. The witness: No. The Court: Gentlemen of the jury, you will disregard the statement of the witness that Mr. Crawford had nothing to do with it. That is not evidence. And please don't make those statements. You are not the jury. You are not passing on this case. These twelve men are. Don't repeat it then, Mr. McGuire. The Witness: No."

Max B. Sherman, auditor of the Covenant Club of Chicago, was called as a rebuttal witness by the defendant, apparently to impeach the testimony of the plaintiff that she had worked as a waitress for that club in March, 1925. The trial court not only practically conducted the examination of the witness, but he stated that he was a member of that club, and he made statements indicating that he had a personal knowledge of facts that bore on the subject matter of inquiry.

The plaintiff was called in rebuttal and the following is the direct examination as shown by the abstract: "I was not employed as a regular waitress in the Covenant Club at any time. I only worked there extras, sometimes at noon, sometimes in the evening, sometimes at midnight parties. I only worked in the old club. The Court: Your statement that you worked there, if it appears that the new part was put up, that the club went in there after the 29th of December, 1924, then you were mistaken about

working in the Covenant Club on the 16th of March, 1925. A. I must be; but I never worked in the new club; only in the old club. I cannot recall where I was working on the day of this arrest. I worked at different places. The Court: All right. (The Witness:) I heard the testimony of Mr. Crawford this afternoon. It is not true that Mr. Crawford did not talk to me. He did all the talking. The Court: Let me ask you this question: Did you handle more than one dress or coat? The Witness: No. I only handled one. The Court: That's what I am asking you. Was anything taken from the bag by anybody there, Miss Conway or anyone else? The Witness: No, your Honor. The Court: Was there anything in the bag, any garment? The Witness: No, your Honor. The Court: Was there any garment taken from anything other than you have already testified? The Witness: No, your Honor. The bag was exactly the size of that (referring to the one the witness had) and if the other one were here it would measure exactly the same. The Court: And how large is that? Well, we will measure it if there is any question about it. Have you got a tape measure there? Any objection to the Court measuring it? Mr. Landon: Yes, I object to a comparison of the two. The Court: Oh! no; not a comparison. Mr. Landon: Of the size. The Court: She has a right to say that it was just like this one, hasn't she? Mr. Landon: I object. The Court: That's the objection? Mr. Landon: I stated it. The Court: You say you object to the Court, when she says it was the size of this one, giving the measurement of the one she exhibited? Mr. Landon: Yes. Let her state the size of that. The Court: Objection overruled. You are not questioning the accuracy of the measurement. Mr. Landon: No. I don't know. I better come up. The Court: Well, come up and look at it. Mr. Landon: No; I will take your word for it. The Court: It is nine inches and a half in length and seven and a half inches in width. Counsel is not

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questioning the accuracy of the measurement. Mr. Landon: No.
The Court: But objects to the measurement. You say it is just the size of that bag. The Witness: Exactly. That was the only hand-bag I had with me that day. That hand-bag was exhibited in the court room. The Court: Was it offered to be returned to you? The Witness: No. I went up to Marshall Field's several times - The Court: Have you seen it since, I asked you? The Witness: No, your Honor. I went up - The Court: Never mind about Marshall Field's. I asked you whether you have seen it since. (The Witness:) The coat was a full length coat, size 40. The Court: What does that mean? The Witness: Well, large enough to fit me. I take a 40 size. The Court: How long? How far did it come down? The Witness: Well, in 1925 they wore the coats longer than they are wearing them now. It was a full-length coat. It came down to near the ankles."

On the hearing of the motion for a new trial the following occurred: "The Court: I regard the damages fixed by the jury as highly excessive, Mr. Landon. If you will pay Fifteen Hundred Dollars I will require him to remit down to that sum or I will grant a new trial. But, if you are going to the Appellate Court I will enter a judgment on the verdict for the full amount. Mr. Landon: I cannot agree to pay \$1500.00. After further argument the court announced he would not require a remittitur unless the defendant would agree to pay, and then, turning to the attorneys for the plaintiff: "What do you say about a remittitur? Mr. Whiteside: We will remit down to \$5,000.00. The Court: Very well. I do not require it, but if you voluntarily enter a remittitur of \$5,000.00 you may do it. Mr. Whiteside: We will remit down to \$5,000.00. The Court: The motion for a new trial is overruled. * * * If you will bring in \$1,500.00 at any time during next week I will set aside this judgment

and require the plaintiff to accept \$1,500.00 or I will grant a new trial." The defendant had the legal right to appeal from any judgment that might be entered, and the attempt by the trial court to coerce it to waive that right amounted to an abuse of judicial power.

That the conduct of the trial court during the proceedings was highly prejudicial to the defendant is evident. In fact, the plaintiff has not attempted to answer this contention of the defendant. The record shows that at times, because of the continuous examination of witnesses for the defendant by the court, counsel for the defendant was practically prevented from properly presenting his evidence, and that when the court had finished his examination of certain of these witnesses it was hardly necessary for counsel for the plaintiff to cross-examine them. We are not aware of any record in a case where there was a jury trial where the trial court took such a large part in the examination and cross-examination of the witnesses. We are anxious to be temperate in our comments on the conduct of the court in the instant case, and we therefore quote the and fitting expressive language of our Supreme Court in passing upon a like question. In The People v. Rongetti, 351 Ill. 581, 596, the court said:

"It is generally within the province of the court to propound pertinent and properly-framed questions to a witness to clear up the record when it appears that such questions will not be asked by counsel. The exercise of that power, particularly on such matters as constitute crucial points of the case, is not only embarrassing to counsel if leading, suggestive and improper questions are asked, but is always likely to arouse a serious apprehension in the minds of the jury as to what the court thinks on the issue of guilt. To question a witness is a task of great delicacy when done by the court, and even the tone or inflection of the voice of the judge may tend to indicate to the jury what the court thinks as to the guilt of the defendant. Expressions on his features and the method and manner of ruling on objections are all likely, in a contested case, to be taken by the jury as some indication of the opinion of the court on the question of guilt of the defendant or credibility of the witness. Any extended examination of a witness by the court is essentially unfair unless it is very skill-

and various other things which are not mentioned in the text. The text is very long and contains many details which are not mentioned in the text. The text is very long and contains many details which are not mentioned in the text. The text is very long and contains many details which are not mentioned in the text.

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fully and tactfully conducted. Circumstances arise in the trial of a case where orderly disposition of the court's business requires that the court examine witnesses, or even cross-examine them briefly. But such a situation did not arise here. Instances are rare and conditions exceptional which will justify the presiding judge in entering upon and conducting an extended examination of witnesses, and the exercise of a sound discretion will seldom deem such action necessary or advisable."

(See also The People v. Wilson, 334 Ill. 412; The People v. Hainallen, 300 Ill. 383.)

The defendant seriously contested the case on the merits and it had the right to have the jury determine the facts, uninfluenced by any statement, act or conduct of the trial court. It has been deprived of that right and has not had a fair and impartial trial, and the judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, F. J., and Gridley, J., concur.

(1978) 100

... (faint text) ...

33472

JOSEPH M. FLEMING,
Appellee,

DOMINICK MARUBIO,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action on the case, Joseph M. Fleming, plaintiff, sued Dominick Marubio, defendant. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$1,500. Plaintiff remitted \$101.40 and judgment was entered for \$1,398.60. This appeal followed.

This is the third jury trial of the cause. In each the defendant was found guilty. The declaration consisted of three counts. The second count pleads a certain ordinance of the City of Chicago, which provides that "No person shall leave any horse or other animal attached to any carriage, wagon, cart, sleigh, sled, or other vehicle in any public way of this city, without securely fastening such horse or other animal, under a penalty for each offense of not less than two dollars nor more than ten dollars;" that the defendant, in violation of the said ordinance and regardless of his duties in that behalf, carelessly, etc., left his team of horses then and there attached to the said vehicle on the public highway, without securely fastening the same, and that the team of horses became frightened or restive



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and by reason of the defendant's negligence, etc., in failing to securely fasten the said team of horses, they then and there ran away; that at the time and place aforesaid there were large numbers of children of tender age passing and playing upon and along said public highway, all of which the defendant well knew, or in the exercise of due care should have known, and that when the said team of horses ran away they threatened and endangered "the life and limb of said children" then and there on the public highway, "seeing which danger as aforesaid, the plaintiff, in the exercise of all due care and caution for his own safety, went to the rescue of said children and attempted to, and did, stop said runaway team of horses of the defendant, in the doing of which, the plaintiff was then and there, and as a direct result thereof, necessarily and unavoidably struck by the hoofs and legs of said horses, and thrown violently to and upon the ground there, and then and there severely trampled on by said horses of defendant, and he, the plaintiff, thereby, then and there, sustained injuries," etc. The third count pleads the said ordinance and also charges the defendant with wilful and wanton negligence.

The defendant first contends that the court erred in not directing a verdict for the defendant. After a careful examination of the evidence we are satisfied that there is no merit in this contention.

The defendant next contends that the "plaintiff is guilty of contributory negligence," and he cites in support of this contention the case of Devine v. Pfalzger, 277 Ill. 255. In that case the court held that an attempt by a person to save the life of another although at the risk of his own life or injury to his person is sufficient to exempt such person from a charge of negligence unless his act was rash and reckless, entailing almost certain injury, and

and by reason of the defendant's negligence, was, in fact, as
accusedly stated the wife of the defendant, that she and her two
sons, at the time the plane crashed about 1934, were
of children of tender age passing and playing upon and along with
public highway, all of which the defendant well knew, as to the
existence of the same, would have known, and that she and her two
of course had only that knowledge and understanding of the fact and
kind of said children, that she knew on the public highway, passing
which danger as a result, the plaintiff, in the summer of 1934, at
once was notified for his own safety, and to the extent of said
children and attempted to, and did, keep said children from the
of the defendant, in the summer of 1934, the defendant was then and
there, and as a result of said knowledge, the defendant was
struck by the said and lost of said knowledge, the defendant
is not that the defendant, but that the defendant was
on by said failure of defendant, and as, the defendant, thereby, when
and there, sustained injuries, and the defendant was injured and
said defendant was also injured and injured in said fall and was
injured.

The defendant's negligence was the cause of the
directing a verdict for the defendant. There is no evidence
of the evidence as to whether the defendant was negligent in the con-
duction.

The defendant's negligence was the cause of the
of contributory negligence, and he is not to be held liable for
because the fact of contributory negligence of the defendant is not
the court held that an attempt by a person to save the life of another
attempts at the risk of his own life or injury to his person is
entitled to exempt such person from a charge of negligence unless
his act was rash and reckless, entailing almost certain injury, and

that where the only ground for justifying the entirely voluntary action of a person in attempting to stop a horse, which was running away with an empty buggy on a residence street of a city, is that he encountered the risk to save human life, there must, in order to justify a recovery of damages from the owner of the horse, be some evidence tending to show that some person or persons were in danger, or some circumstances proved from which such inference may reasonably be drawn, and the court held that in that case there was no evidence nor circumstances that would raise an inference that there was anyone in the slightest danger from the horse and that there was nothing in proof from which it could even be presumed that the plaintiff had any occasion to believe that anyone was in danger. In the instant case, the defendant concedes that some young children had been playing in the street, but he argues, apparently, that the evidence shows that they had scattered and gotten out of the way of the horses before Fleming attempted to stop the latter. The evidence for the plaintiff is to the effect that there were six or seven children on the street, playing - running back and forth; that the team started slowly and that when the plaintiff ran out to stop it the children were right in front of the horses. The defendant has not fairly abstracted the evidence bearing on this question. As the defendant offered no proof in reference to the accident the plaintiff's evidence as to the occurrence stands unchallenged. Under the facts of this case and the rule of law laid down in Devine v. Pfaelzer, supra, the plaintiff was not guilty of negligence in stopping the horses of the defendant on the occasion in question.

The defendant contends that the plaintiff failed to prove by a preponderance of the evidence that the team of horses in question belonged to the defendant. There is absolutely no merit in this contention and in our judgment the claim of the defendant, in this

regard, was a mere pretense, and made to evade responsibility.

The defendant contends that the trial court permitted improper cross-examination of the defendant, Marubio, and the witness Florence Marubio. We find no merit in this contention.

The defendant also contends that the court erred in permitting the plaintiff to introduce in evidence a certain letter written by the defendant, dated March 8, 1926. In this letter the defendant claimed that it was not his team that hurt the plaintiff and he charges the plaintiff, therein, with obtaining money from him by false pretenses. It is a sufficient answer to the present contention to say that we are unable to see how this letter could possibly have injured the defendant. It had a tendency to injure the plaintiff.

The defendant contends that the court erred in refusing to give to the jury defendant's refused instruction number two. The defendant does not assign any reason or argument in support of his contention, and we might therefore disregard it; however, we think the instruction, under the ruling in Jeneary v. C. & I. Traction Co., 306 Ill. 392, is bad. In that case the court held that ill-will or an intent to injure is not a necessary element of wilful and wanton negligence.

The defendant next contends that "remarks of plaintiff's counsel were improper, inflammatory and pernicious." We have carefully considered the argument of counsel bearing on this contention and we fail to find any remarks that would justify a reversal of the judgment in this case.

The defendant next contends that the amount of the judgment is excessive. We find no merit in this contention.

Three different juries, passing upon the evidence, have found the defendant guilty. The defendant has not produced any evidence as to the manner in which the accident occurred, and the

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. The first group consists of the following:

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1. The following is a list of the names of the persons who were interviewed for the purpose of this report:

REPLY TO THE DIRECTOR AND OTHER MEMBERS OF THE BOARD OF
MANAGEMENT AND TO THE PUBLIC ON THE MATTER OF THE

THESE DOCUMENTS ARE THE PROPERTY OF THE NATIONAL ARCHIVES AND ARE LOANED TO YOU BY THE NATIONAL ARCHIVES. THEY ARE NOT TO BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE NATIONAL ARCHIVES.

and the fact that the Government has not been able to obtain any information from the Government of the United States regarding the activities of the Government of the United States in the United States.

major point upon which he relied, upon the trial, was that the team and the wagon in question did not belong to him. As we have heretofore stated, the proof clearly shows that the horses and wagon did belong to the defendant and that his disclaimer of ownership was a mere pretense to evade responsibility.

The judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

33658

THE FOREMAN TRUST & SAVINGS BANK,
(Complainant) Appellee,

v.

AMERICAN SASH AND DOOR COMPANY,
a corporation, et al,
Defendants,

On Appeal of AMERICAN SASH AND DOOR
COMPANY, a corporation,
(Defendant) Appellant.

APPEAL FROM INTERLOCUTORY
ORDER OF CIRCUIT COURT,
COOK COUNTY.

OPINION FILED JULY 3, 1929.

MR. PRESIDING JUSTICE WILSON delivered the
opinion of the court.

September 25, 1928, the complainant, the Foreman Trust & Savings Bank, a corporation, as trustee, in trust agreement No. 1396, filed its bill of complaint against the defendant, American Sash and Door Company, a corporation, charging that it had a judgment against the defendant for the sum of \$3,520 and that execution upon said judgment was issued and delivered to the bailiff of the Municipal Court and that the same was, thereafter, returned unsatisfied.

The bill further charged that the judgment is in full force and effect and that the defendant has conveyed its property to the North Side Sash and Door Company, or some one else, with the intention of defrauding the complainant and hindering and delaying the complainant in the collection of its judgment. The prayer of the bill is for discovery, the payment of the judgment, for a receiver and for general relief.

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The defendant filed its answer denying generally the charges in the bill, except as to the procurement of the judgment, and as to this it neither admits nor denies. The bill was verified as follows:

"Richard Fisher, being assistant secretary of The Foreman Trust & Savings Bank, on oath states that it is the complainant in the foregoing bill named, and has heard the same read and knows the contents thereof. That the matters and things in said bill contained are true of his own knowledge, except as to those matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

(Signed) The Foreman Trust & Savings Bank,
not individually but solely as
Trustee under Trust Agreement 1396.
By (Signed) Richard Fisher."

April 22, 1929, an order was entered as follows:

"On motion of Otto V. Rentner, solicitor for complainant, defendants being present by counsel, and this matter coming on to be heard upon the petition and bill of complaint heretofore filed for the appointment of a receiver, and the Court having heard arguments of counsel and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that James G. Holland be and he is hereby appointed receiver for the defendant, American Sash & Door Company, a corporation, to take charge and control of all assets of the American Sash & Door Company, a corporation, with the usual powers of receivers of this court, upon filing bond in the sum of Five Hundred Dollars (\$500.00) to be approved by the Court."

No bond was given by the complainant in support of its application for a receiver.

Section 55, Chapter 22, Cahill's Illinois Revised Statutes of 1927, provides:

Exhibits 100-1000

"* * "That before any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court or judge, conditioned to pay all damages, including reasonable attorneys' fees sustained by reason of the appointment and acts of such receiver, in case the appointment of such receiver is revoked or set aside; provided, that bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond."

No such bond was required or given by the complainant in support of its application for a receiver, and nothing appears in the bill showing any good reason why the bond should be waived. The order of the court appointing the receiver fails to disclose that it was entered after a full hearing, nor does it affirmatively appear in the order that the court was of the opinion that the receiver should be appointed without bond because of any good cause shown. National Supply Co. v. Illinois Preserving Co., 239 Ill. App. 59; Watson v. Gudney, 144 Ill. App. 624.

Under the circumstances as disclosed by the record, the appointment of the receiver was not in compliance with the statutory requirement and this cannot be dispensed with.

The verification to the bill of complaint appears to have been made by the Foreman Trust & Savings Bank, as Trustee, by Richard Fisher, an Assistant Secretary. The acknowledgment, to say the least, was irregular. It does not appear to be the affidavit or verification of Fisher, but rather of the Foreman Trust & Savings Bank, as Trustee.

We are of the opinion that the appointment of a receiver without the giving of a bond by the complainant,

under the circumstances as disclosed by the record, was error.

For the reasons stated in this opinion the order of the Circuit Court is reversed and the cause remanded with directions to discharge the receiver.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

RYNER AND HOLDOM, JJ. CONCUR.

Under the provisions of the Act of March 3, 1879, as amended, the

Secretary of the Interior is authorized to

make such regulations as may be necessary to carry out the

provisions of the Act.

Approved: _____

Secretary of the Interior

14
GABEL PACKING CO., INC.
(ARTHUR M. FALKER and ELMER
M. FALKER),

Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT, COOK
COUNTY.

MR. PRESIDING JUSTICE McSWEENEY DELIVERED THE
OPINION OF THE COURT.

This is an appeal from an interlocutory order enjoining
Arthur M. Falker and Elmer M. Falker, defendants:

"from transferring, assigning, setting-over, disposing
of, pawning, distributing or diverting, either directly
or indirectly, to their own use and benefit, any
of the property, funds or assets of the Gabel Packing
Company, defendant corporation, until the further
order of this court; this order to become effective
upon the complainants furnishing a bond in the
usual form, in the sum of \$2,000, with sureties to
be approved by the court."

Complainants have not yet furnished such a bond, and as the
injunction is not effective until a bond is filed, the question
arises, is the order appealable?

While it is true that the record shows that the order
is not yet effective, yet it purports to be an interlocutory
injunctive order and the test of its appealability should not
be its effectiveness in operation but whether the court properly
entered such an order. Section 123 of the Practice Act provides
that an appeal is allowed "whenever an interlocutory order or
decree is entered in any suit pending * * * granting an injunction."
Furthermore, the statute provides that such appeal must be taken
"within thirty days from the entry of such interlocutory order

1. The first part of the report is devoted to a general survey of the situation in the country.

2. The second part of the report is devoted to a detailed analysis of the economic situation.

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16. The sixteenth part of the report is devoted to a detailed analysis of the insurance situation.

17. The seventeenth part of the report is devoted to a detailed analysis of the banking situation.

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19. The nineteenth part of the report is devoted to a detailed analysis of the bond market situation.

20. The twentieth part of the report is devoted to a detailed analysis of the real estate situation.

or decree and is perfected in said Appellate Court within sixty days from the entry of such order or decree." Defendants were therefore obliged to take their appeal within thirty days from May 10, 1929, when the order was entered. If they had deferred doing this until after the thirty days had expired, they would have lost their right of appeal, which is purely statutory. We hold that the propriety of the temporary injunction may be considered by us upon appeal regardless of whether or not it is effective.

In Lichtstern vs. J. Rosenbaum Grain Co., 176 Ill. App. 250, a similar injunction order was under consideration and held erroneous, the court saying that, as the order did not require the complainant to file the bond within any fixed time, it was therefore entirely optional with him when, if ever, the injunction should become effective; that thereby the complainant was delegated the power to decide whether the need for a preliminary injunction was urgent or otherwise.

We hold that the order is erroneous in not fixing a time certain within which the complainants should file the bond required by the order.

A more fundamental objection to the order is the character of the bill itself. It is filed by five minor stockholders holding less than one-fourth of the stock, against the Cabel Packing Company and its president, Arthur E. Falker, and its vice-president, Elmer E. Falker. It charges the Falkers with failure to hold corporate meetings and failure to keep proper records and accounts, that they dominated the corporation for their own interest, and prays for an accounting. However, the bill further asks for a receiver, an injunction the winding up of the business through the medium of a receiver and the distribution of the assets among its stockholders after the payment of debts.

The bill also avers that the corporation is a solvent, going concern with a profitable business. Defendants' answer denied the allegations of fraud and misconduct and prayed the advantage of a demurrer and asserted that the corporate assets were worth about \$120,000. over the liabilities. The answer was filed within three days after the bill was filed and the case was thereupon referred to a master in chancery to take proofs and report his conclusions.

It has repeatedly been held by the courts of this state that equity has no jurisdiction of a bill by a stockholder to appoint a receiver and make a sale and distribution of the assets of a going, solvent concern ~~xxx~~ where there is no charge of fraudulent mismanagement whereby the corporation is in imminent danger of insolvency. The most recent case is Steenrod vs. Gross Co., 324 Ill. 353, where it was held that appointing a receiver to take possession of the assets of a corporation and distribute them is tantamount to dissolving the corporation by a decree in equity and that a court of chancery is without jurisdiction to decree the dissolution of a corporation in the exercise of its general equity powers but is limited in that respect to the jurisdiction conferred upon it by statute, namely: Section 54 of the General Corporation Act, Chapter 32. To the same effect are the decisions in Blanchard Bros. & Lums vs. Co. Co., 137 Ill. 411; Engle vs. Weigley, 155 Ill. 491; Whether vs. Pullman I. & S. Co., 143 Ill. 197. Especially will the court refuse to appoint a receiver where, in spite of irregularities on the part of officials, the corporate business has prospered. Bisler vs. Sumnerfield, 210 Ill. 66; Klein vs. Independent Brg. Assn., 231 Ill. 594.

The bill shows that the Gabel Packing Company started as a small concern with a capital stock of \$10,000. and under the management of the defendants, Packers, who are charged with irregularities, the business grew to one with a capital of \$345,000. and its net assets are about \$125,000. The bill insofar as it prays for a receiver, a winding up of the business and a distribution of the net

asset among the stockholders is clearly demurrable as calling for the interference by a court of equity with the management of a solvent, prosperous corporation at the instance of minority stockholders.

The defendants ask us to reverse the interlocutory order, ^{the bill} which we shall do, but also ask us to remand with directions to dismiss for want of equity, citing East, Peck & Co. vs. Steyer Mfg. Co., 177 U. S. 436, and Smith vs. Vulcan Iron Works, 166 U. S. 516. Whatever may be the practice in the Federal courts, it has been the universal practice in this court not to order a bill dismissed upon an interlocutory appeal. One of the reasons for this is that Sec. 123 of the Practice Act specifically provides that "no appeal shall lie or writ of error be prosecuted from the order entered by said Appellate Court on any such appeal." For us to order the bill dismissed for want of equity would be a final adjudication of the controversy and the complainants, by virtue of the statute just quoted, would be deprived of the right of review by the Supreme Court.

For the reasons indicated, the interlocutory order of May 10, 1929, is reversed.

REVEREND.

O'SUNNOR AND MARCHETT, JJ., concur.

1110' end

PURCHASERS SECURITIES CORPORATION,
a Corporation,

Appellee,

vs.

WEEKLY RACING GUIDE, PAUL STARK,
W. L. JENKINS, J. TAYLOR, HERBERT
BRANDON and A. ROSE,
Appellants.

254 I.A. 608

APPEAL FROM SUPERIOR COURT
OF COCK COUNTY,

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On March 14, 1909, complainant filed its verified bill against the defendants and on the same day, without notice, obtained an order for a writ of injunction restraining the defendants from

"(1) In any manner interfering with the premises or employees of the complainant by unlawful and improper entry upon the premises of said complainant and by conduct calculated to terrorize or otherwise interfere with or threaten the personal security of said employees; and thereby injure the business of said complainant;

(2) Interfering with the business of said complainant by conspiring falsely and maliciously to publish false, derogatory, vindictive or scurrilous articles concerning the business or manner of doing business of said complainant;

(3) Conspiring wilfully and maliciously to publish and wilfully and maliciously publishing articles tending to destroy public confidence in the business of said complainant."

Upon the entry of the order complainant filed its bond, as required, and the writ issued. On the same day summons was issued and served on the Weekly Racing Guide and its president, Branger, two of the defendants. On March 20th appearance of all of the defendants was filed by counsel and on March 25th the defendants took an appeal under the statute from the order awarding the injunction by having its bond approved by the clerk of the court.

The order appealed from having been entered on the face of the verified bill, the question for decision is whether the allegations are sufficient to warrant the entry of the order and without notice.

It is alleged in the bill that complainant is a Delaware

8-10-1941



The following information was obtained from the records of the
Department of the Interior, Bureau of Land Management, at
Washington, D. C., on August 10, 1941.
(1) The land in question is located in the
County of [illegible], State of [illegible].
The land is situated in the [illegible] section of the
[illegible] Township, [illegible] County, [illegible] State.
(2) The land is owned by [illegible] and is
subject to a mortgage in favor of [illegible].
(3) The land is being offered for sale by
[illegible] and the proceeds of the sale are to be
used for the purpose of [illegible].
(4) The land is being offered for sale at a
public auction to be held on [illegible] at [illegible].
(5) The land is being offered for sale at a
price of [illegible] per acre.
(6) The land is being offered for sale at a
price of [illegible] per acre.
(7) The land is being offered for sale at a
price of [illegible] per acre.
(8) The land is being offered for sale at a
price of [illegible] per acre.
(9) The land is being offered for sale at a
price of [illegible] per acre.
(10) The land is being offered for sale at a
price of [illegible] per acre.

corporation, licensed in the month of May, 1928, to do business in Illinois, with its principal place of business in Chicago; that the nature of its business is to purchase, acquire, own, hold, sell, invest and deal in stocks, bonds and other securities; to deal in all classes of securities and investments, and to finance and assist in financing other companies, corporations and syndicates; that it has an authorized capital stock of two and a half million dollars; that by its charter it is authorized to issue 45,000 shares of stock - 25,000 shares of preferred of the par value of \$100 per share, and 20,000 shares of common without par value; that it had issued in the month of May, 1928, and had outstanding 9,000 shares of preferred stock, for which there was paid into the treasury of the complainant \$900,000 in cash or in good and marketable securities of that value; that 20,000 shares of common stock were issued, for which complainant had been paid \$100,000 in cash, so that there was paid into its treasury \$1,000,000, which constituted its capital stock and with which it was doing business; that the business was profitable and growing; that complainant had justly gained and kept the confidence of the public and of a large number of banks, investment houses and other firms and corporations interested in financial investment business; that complainant was a member of various syndicates and other financial associations and had conducted large and profitable deals; that to be successful it was necessary that complainant continue to enjoy the confidence of the persons and firms with which it was doing business; that complainant's stock had been sold and issued to a great many individual stockholders who paid cash therefor; that M. J. Tenness invested in complainant's stock since its incorporation and was its vice-president, all of which was known to complainant's customers; that the defendants, Annenberg, Brancer, Evans and the Weekly Trading Guide, a

publication entered as second class matter at the Chicago postoffice and published weekly, combining and confederating together and maliciously intending to injure complainant and to destroy its business, "by wicked, malicious, false and fraudulent means," caused advertisements to be published and distributed January 4, 1929, in the Weekly Racing Guide announcing that there would be published a sensational story telling the life history of B. J. Tennes and that on January 12th it did publish such an article in which it was stated that "Tennes has never been a gambler in the sense of taking chances; that when he gambles it is on a sure thing;" that Tennes was "Chicago's Handbook King;" that he "used to boss the handbook racket around Chicago, was a hard-boiled gink with an iron will. What he went after he got and the methods he used in getting it were not always according to Moyle either;" that he was "trying to hook up with Clarence Saunders, the famous Piggy-Wiggler;" that he wants "Clarence to go in with him on a scheme for selling ice to the Eskimos up in Alaska on a cash-and-carry basis;" that Tennes probably would not put up much cash "because he might sell a couple of million dollars worth of stock in the new venture to the gullible public." The bill then describes a cartoon which appeared in the Weekly Racing Guide which referred to Tennes as conducting a stock racket; that the statements were malicious and fraudulent and published for the purpose and with the intent of causing the public and complainant's customers to lose confidence in complainant and its business; that shortly before March 9, 1929, the individual defendants caused certain of their agents and employees to force their way unlawfully into complainant's offices, and that they took a flashlight picture of the offices, which was accompanied by an explosion of illuminating powder which greatly alarmed and terrorized complainant's employees, and that this picture was published in the Weekly Racing Guide; that de-

defendants caused to be published in the Weekly Racing Guide an article concerning complainant's business and its vice-president, Tennes, stating that if and when complainant had sold certain of its shares of stock it would still have 30,000 shares of Class A common stock and 100,000 shares of Class B common stock, which cost nothing and which would represent the controlling interest of complainant; that "if the chain store scheme is a flop, the syndicate will have \$330,000 in cash and a controlling interest in the company which cost nothing. If the chain stores make money, the syndicate has control of the organization without spending a nickel and also has the \$330,000 in cash.*** The poor old public will be holding the bag." Other matters are set up in the article which we think it unnecessary to mention here. They are all to the effect that the complainant is conducting a fraudulent business. It is alleged that the matters published were false and known to the defendants to be false.

It is further alleged in the bill that the only stock offered by complainant in any chain store organization was stock issued by Clarence Saunders Stores, Inc., which stock was offered to the public by a group of investment bankers, of which complainant was one; that the amount so offered by the complainant was 500 units which was but 2 1/2% of the stock offered by the group of investment bankers; that the plan of selling stock was originated not by Tennes or the complainant but by a New York investment house which had no financial interest in complainant; that the stock was offered for sale and met with the approval of associations such as the Chicago Stock Exchange; that none of the stock was issued to any member of the syndicate without payment and that complainant had received the \$330,000 above mentioned in cash for stock sold. It is further alleged that the defendants threatened to publish "further malicious, false and fraudulent statements" concerning the complainant which

would greatly damage its business unless restrained by injunction; that the defendants, their agents and employees were still maliciously combining and conspiring together to ruin complainant by circulating false statements concerning the nature of its business. The complainant prayed that the writ of injunction issue without notice and averred that Thursday, March 14, 1929, was the date upon which the next issue of the Weekly Racing Guide would be distributed; that if notice of the application for injunction was given, a hearing thereon could not be had until March 15th and in the meantime the paper would be distributed and complainant irreparably damaged.

It is contended that the order is wrong and should be reversed because it is in violation of the right of free speech and free press, which is protected by the United States and Illinois constitutions, and a great deal is said in the brief of counsel for the defendants to the effect that what was published of and concerning the complainant and Tennes was true. Obviously this latter argument is unsound. The basis for the order is the verified bill and it sets up that the statements concerning complainant and Tennes are false, untrue and were maliciously made for the purpose of destroying the complainant's business. On the record before us the allegations of the bill must be taken as true. If, as defendants contend, the charged made and published were true, they should have filed their answer or, at least, affidavits to that effect. Not having done so, we must under the law assume that the publication was knowingly false and that it was published with the intent of irreparably injuring or destroying complainant's business. We think the question of free speech and free press is not involved as the record now stands. We think it plain that the publication of such articles as are stated in the bill would irreparably damage complainant's business if not destroy it. In these circumstances we think a court of equity will interfere by awarding a writ of injunction.

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that the defendants, their agents and employees were willfully maliciously
combining and conspiring together to ruin complainant by circulating
false statements concerning the nature of his business. The com-
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averred that Thursday, March 14, 1935, was the date upon which the
next issue of the Weekly Trading Guide would be distributed; that in
notice of the application for injunction was given, a hearing thereon
could not be had until March 15th and in the meantime the paper would
be distributed and complainant irreparably damaged.

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it sets up that the statements concerning complainant and Barnes are
false, untrue and were maliciously made for the purpose of destroying
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of free speech and free press is not involved as the record now
stands. We think it plain that the publication of such matter as
are stated in the bill would irreparably damage complainant's busi-
ness if not destroyed it. In these circumstances we think a decree
of equity will interfere by awarding a writ of injunction.

Upon a consideration of the allegations of the bill, which on this record we must assume to be true, we think it obvious that the defendants were not moved by their desire to protect the public from buying worthless securities, but on the contrary they seem to have some personal quarrel with the complainant.

While the question whether the injunction should have been issued without notice to the defendants is not free from doubt, yet we do not think we would be warranted under the facts disclosed by the bill in reversing the order appealed from. Sec. 3, chap. 69 of the Revised statutes provides that:

"No court, judge or master shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear, from the bill or affidavit accompanying the same, that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice."

The bill alleges that the next issue of the publication was to be distributed on March 14th, the day on which the bill was filed; that if notice were given, it could not be heard before the following day, when it would be too late. In these circumstances we think we would not be warranted in reversing the order because no notice had been given.

The order of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

23687

CITIZENS TRUST AND SAVINGS BANK,
a corporation,

Complainant - Appellee,

v.

ARAR BLAIR ET AL, Defendants,

Appeal of Catherine G. Smith,
Defendant, Appellant, from
Interlocutory Order Appointing
Receiver.

25414-803²

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

OPINION FILED July 11, 1929

MR. JUSTICE HOLDEN delivered the opinion of the court.

Catherine G. Smith, a defendant in this cause, prosecutes this appeal from an interlocutory order appointing a receiver pendente lite of real estate described in the bill, which is the same trust deed sought to be foreclosed in Davis v. Blair, 352 Ill. App. 417, complainant here, however, being a different person from that in the case of Davis v. Blair, supra. The trust deed sought to be foreclosed was made to the Chicago Title & Trust Company, as trustee, who is not a party to this foreclosure suit.

Complainant-appellee, Citizens Trust and Savings Bank, has failed to follow this appeal by filing its brief, and the cause is therefore heard ex parte on the brief of defendant Smith.

It is assigned and argued for error that the court erred in appointing a receiver, because the trustee in the trust deed sought to be foreclosed, the Chicago Title and Trust Company, is not a party to the cause.

The record discloses the fact that the trustee in the trust deed sought to be foreclosed, Chicago Title & Trust Company, is not a party to the foreclosure proceeding. In Hodson v. Wick

211 Ill. 546, it was held that a trustee, as well as the cestui que trust, is a necessary party to a foreclosure proceeding. In Nyers v. Dyar, 89 Ill. App. 657, one Adolph Dyar, trustee, was not made a party, and the court held that such omission was fatal and that the decree must be reversed for the reason that in the absence from the record of the trustee, in whom the legal title to all the property was vested, an adjudication of the cause was error. In Salah v. Frussdall, 1 *ibid.* 126, it is said:

"It has long been the settled doctrine of Courts of Chancery in this country, that a party holding the legal title to property involved in a judicial proceeding, is an indispensable party to the record of such proceeding; * * *. This bill is filed to subject these premises to sale by a decree of foreclosure of the trust deed to Barker; * * * it is clear that no proceeding to subject the same to sale can be effective or binding on him unless he be made a party; for it is a familiar and uniform rule that a decree cannot affect the rights and interests of parties who are strangers to the record of such proceeding. Therefore, a sale under any decree to which he was not a party could pass no title to the purchaser. * * * It was error for the court below to decree a sale of said premises, so long as the trustee who really held the fee simple title was not before the court, and for this error the decree of the court below is reversed.

In Lambert v. Nyers, 22 *ibid.* 616, it was held that in a chancery suit to foreclose a trust deed in the nature of a mortgage the grantee in such trust deed is an indispensable party.

An objection to the want of a necessary party can be raised at any stage of the proceeding, either in the trial court or in a court of review for the first time. As said in Gaumer v. Snedeker, 330 Ill. 511:

"The objection may be made by a party at the hearing or on appeal or error, and the court will upon its own motion take notice of the omission and require the omitted party to be made a party to the litigation even though no objection is made by any party litigant."

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In the instant case, in the absence of the trustee as a party to the bill, no valid decree could be entered affecting the title vested in the trustee. The trustee is an indispensable party. Moreover, the bond given by the receiver is no protection to the trustee. As the trustee is an indispensable party he was entitled to notice of the application for the appointment of a receiver. Such notice was not given and the bond was made for the benefit of the defendants in the foreclosure suit, of which the trustee was not one.

For the error above indicated, the order appointing a receiver is reversed with directions to the Circuit Court to enter an order vacating the order appointing the receiver and to discharge such receiver.

REVERSED AND REMANDED
WITH DIRECTIONS.

WILSON, E.J., and WYNER, J. CONCUR.

[illegible]

33383

H. ISAACSON, for use of
Motor Club Service Corporation,
and INTER-INSURANCE EXCHANGE,
Plaintiffs in Error.

v.

MANUEL W. STEINER,
Defendant in Error.

254-11.608
BRANCH TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

The original suit below was brought in the name of H. Isaacson as plaintiff against defendant in error Steiner, to recover damages to Isaacson's automobile resulting from alleged negligent operation of Steiner's automobile. After issue taken the suit was dismissed by stipulation of the parties but was reinstated on plaintiff's motion. While defendant was allowed an appeal from the order of dismissal he did not perfect one but took issue on an amended affidavit of merits pursuant to leave given, pleading among other things a release by Isaacson of his cause of action. On the same day on motion of Isaacson's attorney the above named Motor Service Company and Inter Insurance Exchange were made "co-plaintiffs" but they filed an amended statement of claim as sole plaintiffs alleging damages by reason of a certain policy of insurance issued by them to said Isaacson on his said automobile under which they paid him \$410.94 toward the necessary repairs of the same and by which they became subrogated to his rights, claims and demands against defendant as a result of said collision to the amount they had so paid, and of which defendant at the time of said payment had due notice, and that after suit

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SUBJECT: [REDACTED]

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was begun Isaacson executed and delivered to defendant a release in full of all his claims and demands as a result of said collision without the knowledge and consent of said "plaintiffs."

Later, on leave granted, a second amended statement of claim was filed changing the title to M. Isaacson, for the use of Motor Club Service Corporation and Inter Insurance Exchange v. Emanuel M. Steiner, the allegations being in substance the same as in the first amended statement of claim and still referring to the beneficial plaintiffs as the "plaintiffs." But the irregularity should not defeat the cause of action, for under sec. 18 of the Practice Act a suit at law brought under the subrogation provision of any contract may be brought either in the name of or for the use of the subrogee.

But on defendant's motion the second amended statement of claim was dismissed on the sole ground, as alleged in the order, that said release and payment set forth in said amended statement of claim was a full and complete bar to the further prosecution of the suit, and plaintiff electing to stand by the pleading has sued out this writ of error.

If as alleged in the pleading defendant had notice of the subrogee's rights when the release was executed it did not constitute a bar to the cause of action.

While under the change of title reference to the beneficial plaintiffs as the plaintiff was irregular the nature of the claim could not fail to be understood as one brought by a nominal plaintiff for the benefit of his subrogee. The action being one of the fourth class and the nature of the claim being readily understood the suit should not have been dismissed because of such informality or on the ground stated. Nor, as claimed by defendant in error, could the dis-

misual be justified because the pleading did not set out the policy of insurance or the subrogation provision, or because it unnecessarily alleged that the release was a fraud on the subrogees. Hence, the judgment will be reversed and the cause remanded for a rule on defendant to plead to the statement of claim as it stands or as it may be corrected.

REVERSED AND REMANDED.

Donnan and Gridley, JJ., concur.

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35401

H. J. MARGOLIS,
Appellee,

v.

FIDELITY BOND & MORTGAGE
CO.,
Appellant.

RECEIVED FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The judgment appealed from is for \$2,500 for commissions claimed for procuring from defendant a real estate mortgage loan on premises known as 5625 Anthrop avenue. The case was tried without a jury.

The principal ground urged for reversal is that the court's finding is against the manifest weight of the evidence, especially as to the controverted fact whether plaintiff was the procuring and efficient cause of effecting the loan.

Defendant is engaged in the business of making mortgage loans. Its home office is in St. Louis. It has a branch office in Chicago in charge of one Golder. One McCrea of the home office visits defendant's branch office and passes on applications for loans which are then sent on to the home office for acceptance. While Golder does not officially pass upon them he receives them and evidently discusses their acceptability to some extent before or when they are presented to McCrea or the home office.

Plaintiff is a broker and in October, 1927, one Zeman requested him to obtain a loan on said property to be secured by the land and apartment building to be constructed thereon. Zeman then left with plaintiff a set of plans, specifications and detailed data showing the type of the proposed building, its value



FIGURE 1. A map of the study area showing the location of the study sites.

The following information was obtained from the field observations and interviews with the local people. The information was collected from the local people who were living in the study area. The information was collected from the local people who were living in the study area.

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and prospective rental and income, and on October 21, 1927, gave plaintiff written authority to negotiate a loan as secured for \$280,000 for a period of 12 years signing the instrument in the name of the then holder of the title. It appears that Leman and several other parties had some undisclosed interest in the property or its title, and Leman seems to have been the active, authorized agent of the owners, whose interests were later merged into the Winthrop Building Corporation and in whose name the loan was consummated through the offices of Leman and others apparently acting under or for him, for said amount upon said property.

The point made by appellant that plaintiff did not produce a party or parties ready, willing and able to take the loan is hardly worthy of consideration under such circumstances. Not only was Leman's authority to act for the owners or said corporation not questioned at the trial but defendant's own evidence discloses that Leman was the only one of the alleged owners present in the subsequent negotiations resulting in the loan.

Plaintiff testified that he first saw Golder as to obtaining the loan and was told by him that McGree would be in Chicago shortly; that when McGree arrived he submitted to him the data and left the same with him together with the written authority from Leman to negotiate the loan. He testified to several conversations with both McGree and Golder at subsequent meetings and over the telephone during a period of several weeks to the effect that the matter was still under consideration by defendant.

This testimony was met mainly by categorical denials by Golder and McGree of these conversations or of any knowledge of an application for the loan through plaintiff. One Alexander, who also claimed an undefined interest in the property, testified that he visited plaintiff's office twice, once when introduced by Leman,

and later when he asked for and obtained the plans of the building left with plaintiff. While plaintiff did not recall meeting him and said it was Roman who asked for and obtained the plans there was no proof or ground for inference that plaintiff's authority was by that act or otherwise withdrawn or suspended or that he abandoned the negotiations. On the contrary, his evidence was to the effect that after submitting the application for the loan to defendant's agents, as aforesaid, and leaving with them his authority to present the same together with said detailed data, and the name and responsibility of the contemplated tenant of the proposed building, he was assured that defendant had the matter under consideration, and from time to time made inquiries in regard thereto and was awaiting acceptance of his application when in January following he learned defendant had made the loan.

The circumstances under which the loan was finally consummated smack of an underhanded scheme and conspiracy between defendant's agents and Roman and others to deprive plaintiff of his agreed commission of one per cent on the loan of \$250,000. It is conceded that that was the usual and customary commission paid by the lender in such transactions and plaintiff testified that it was also agreed upon. The explanation of how the loan was finally consummated through one Dunn who was paid the commission has a false ring. Dunn claimed that he was approached by another broker named Edwards, who was apparently in contact with Roman on the subject, and singularly enough went directly to defendant and entered into a written agreement with it for such loan which defendant accepted November 28, within three or four days after he submitted the application and about a month after one was first submitted by plaintiff. It appears too that negotiating loans was only incidental to Dunn's real estate

business, that he never was a "regular bond and mortgage broker," and even discontinued his real estate business shortly after the loan was finally negotiated. He had never previously done business with either Edwards or defendant and had not previously met McGren. He made no explanation of how he came to go to defendant for the loan, or why the matter was put in his hands by Edwards, or why the latter, being a mortgage broker, did not transact the business personally or through his own office. He did not even ask Edwards why he came to him. He had never before negotiated a loan on that type of building. He did not attempt to explain the nature of the data he presented for such a large, important deal, or whether he had any personal knowledge of the security offered, or give any details of his negotiations for the loan. His meager testimony is devoid of convincing details, and on the direct examination was merely to the effect that he "presented the matter" to McGren and Golder about November 20, and that they after taking "the matter" under consideration for a day or two said they might be interested. It was left to cross examination to draw out his part in the matter and the negative character of his evidence, as above stated. Most significant is the fact that while Dunn claimed he did not previously know Zeman and first met him about November 20 or 21, "the day" he said "we had the first meeting on the loan," yet Alexander testified that while Zeman took him to plaintiff's office he first heard of defendant being interested in the loan from Edwards in Zeman's office while the latter was present and that "Dunn was dealing with Zeman and Edwards was supposed to be dealing with Dunn." Notwithstanding these significant admissions and the fact of Alexander's introduction to plaintiff by Zeman and his subsequent visit to get the plans, and an admitted interest on the part of Alexander and Zeman in procuring the loan which Zeman had authorized plaintiff to make on

October 21 previous, yet Alexander and Mann disclaimed any knowledge of the fact that Margolis had presented the matter as defendant, and Alexander testified on cross-examination that he "insisted" on Mann taking him to Margolis on the last of October because he "wanted to get in touch with the parties that are making this loan."

We would hardly have repeated this evidence but for the claim that plaintiff's testimony is uncorroborated and emphatically denied by McGree and Gelder. That he was authorized by a representative of the owners of the property to negotiate the loan, which if consummated would entitle him, according to the evidence, to a commission of \$2,500, and was given the plans of the building and full data for presenting the matter are not denied. That with the prospect of such a commission he should have done nothing about it is hardly credible. Not only are his conversations and negotiations with defendant's agents set out in convincing detail but the testimony of defendant's witnesses discloses a manifest conspiracy between Mann, Alexander, Edwards and defendant's agents to deprive plaintiff of his commission. Undoubtedly this phase of the testimony must have impressed the court in determining the credibility of defendant's witnesses and in its finding for plaintiff. We cannot, therefore, concur in the contention that the finding was against the manifest weight of the evidence. On the contrary, its weight is clearly in support of the finding and judgment.

There is no merit in appellant's other contentions that plaintiff abandoned negotiations and that the statement of claim does not set forth a cause of action.

The judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

33436

GUY WILCO and HARRY LEROY,
Appellants,

vs.

CLARA RADICE and DAN RADICE,
Appellees.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover a commission for procuring a contract of sale of defendants' real estate. In their affidavit of merits defendants admitted engaging plaintiffs to procure a purchaser for the property and that plaintiffs caused one Caldarella and his wife to enter into a contract to purchase the real estate in question. But it was alleged as a defense that it was agreed between plaintiffs and defendants that no commission was to be paid unless the contract was consummated by the delivery of a deed and that the Caldarellas had, without fault of defendants, refused to consummate the deal.

Defendants also filed a claim of set-off based on the refusal of plaintiffs to turn over the \$1,000 earnest money paid by the Caldarellas on account of the contract and placed in the hands of plaintiffs pursuant to a provision in the contract of sale.

A trial by jury was had resulting in a verdict against plaintiffs both on the issues raised by the statement of claim and the set-off, and a judgment was entered merely on the assessment of defendants' damages in the sum of \$1,000 and costs. This appeal followed.

So far as the finding of the jury was against plaintiffs on their cause of action no good ground is urged for disturbing the verdict. The only point urged for reversal on the issues raised thereunder is that the commission was earned when the purchaser was procured and signed the contract. That would

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depend upon the agreement for a commission. The evidence was sufficient, if the jury believed it, as they evidently did, to support defendants' contention that they were to pay no commission unless the deal was consummated by delivery of a deed. Its sufficiency is not questioned.

The real question presented is not one of fact but one of law - whether the set-off was such as could be pleaded against plaintiffs' cause of action. It is based on a claim for a breach of contract by the Calderellas and by reason thereof the alleged obligation of plaintiffs as holders of the earnest money to pay the same to defendants.

The \$1,000 earnest money was to be applied on the purchase price if the sale was consummated, and held by plaintiffs for the mutual benefit of the parties concerned. The contract of sale provides that it shall be their duty in case said earnest money be retained as in the contract provided, to apply the same, first to the payment of any expense incurred for the vendor by his agent in said matter, and second, to the payment of vendor's broker "of a commission of as per agreement percent on the selling price herein mentioned, for his services in procuring this contract rendering the overplus to the vendor."

The contract also provides: "Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money herein paid as above, shall at the option of the vendor be retained by the vendor as liquidated damages ***."

It appears that the sale was not consummated and that plaintiffs paid over the \$1,000 to the Calderellas. But whether they paid over the same rightfully or wrongfully under the circumstances of the case is not, in our opinion, a question for decision in this case. Our statute with regard to filing a claim of set-off

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has been construed by the Supreme Court as not authorizing unliquidated damages arising out of a contract not connected with the subject matter of the plaintiff's suit to be set off against the plaintiff's claim. (Barnes Lumber Co. v. Leonard Lumber Co., 338 Ill. 104; Ewen v. Wilbar, 208 id. 492.) In the present case the claim for earnest money not only does not grow out of plaintiff's contract or cause of action but neither under the terms of the contract of sale nor as set forth in the set-off can the earnest money be deemed to represent liquidated damages. The set-off is based not upon the contract with plaintiff's for commissions, on which their cause of action rests, but on an entirely different contract to which plaintiff's are not parties. (Milward v. Erisolefsky, 380 Ill. App. 516.) While the latter contract evidences the fact that plaintiff's are to hold the earnest money as escrowees, a breach of their duties as such is entirely disconnected from the issue raised upon their claim for a commission. While the contract of sale refers to retention of the earnest money as "liquidated damages" it expressly provides that it shall be retained as such "at the option of the vendor." It was held in Advance Management Co. v. Franks, 366 Ill. 579, that such a provision is inconsistent with an intention to agree upon liquidated damages, and for that reason among others the sum referred to in the contract there under consideration was held to be a penalty, the court saying: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty." For the reasons there given we think the earnest money if elected to be retained should be deemed a penalty. If so, then even if the set-off would lie it would have been necessary to prove the actual damages, and no such proof was made. There was, therefore, no legal basis for a judgment on the set-off.

As, therefore, the set-off, which is in the nature of

a cross action, (Luther v. Mathis, 211 Ill. App. 896, 601) does not set forth a case of liquidated damages nor one connected with plaintiffs' cause of action the judgment thereon cannot stand. The court should have granted the motion to arrest the judgment so far as it might rest on the set-off, and should have entered a judgment on the verdict so far as it related to the finding under the statement of claim in the usual form that plaintiffs take nothing by their suit and that defendants go hence without day, or other equivalent words, with a judgment for costs and execution therefor. (Shank v. Modern Woodmen of America, 118 Ill. App. 536.) But in form the judgment as entered is only on the set-off.

Accordingly the judgment will be reversed and the cause remanded with directions to correct the judgment in form and substance as suggested. Plaintiffs are not entitled to a new trial on their cause of action and defendants are not as a matter of law entitled to a judgment on the set-off.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Gridley, JJ., concur.

33457

FRANK BELMONT and
ROSALIE BEZKOSTNY,
Appellees.

JOSEPH NESVAIBA and
JOSEPHINE NESVAIBA,
Appellants.

2541A.609
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

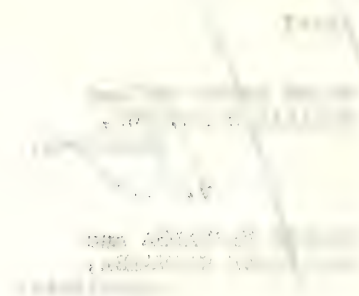
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against defendants for \$5,752.50 and costs upon a promissory note for \$3,600. A previous judgment by confession thereon was vacated and the cause submitted to a jury on issues formed by a plea of general issue and two special pleas, one that the note was without a good and valuable consideration, and the other, that it was never delivered by defendants or any person in their behalf.

The note was given and delivered under the following circumstances:

The parties entered into a written agreement March 17, 1927, whereby in consideration of mutual covenants and agreements and of exchange of properties each was to convey to the other certain described real estate. Defendants were to convey two pieces of real estate in Cook County and "a summer home at Lake Como Beach, Wis. being a room cottage, lot about 60 x 100 feet, same to be fully paid and cottage newly constructed," all subject to certain provisions not here involved. Plaintiffs were to convey to defendants a certain described apartment building in Cicero, subject to like general provisions and an existing mortgage.

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The first of these is the fact that the number of people who are employed in the service sector has increased significantly in recent years. This is due to a number of factors, including the fact that the service sector is becoming increasingly important in the economy, and the fact that the service sector is becoming increasingly important in the economy.

The second of these is the fact that the number of people who are employed in the manufacturing sector has decreased significantly in recent years. This is due to a number of factors, including the fact that the manufacturing sector is becoming increasingly important in the economy, and the fact that the manufacturing sector is becoming increasingly important in the economy.

Plaintiffs were to pay to defendants at the date of the delivery of the deeds \$3,000 cash, and each party was to execute his judgment note for \$1,500 to the other to secure the faithful performance of the contract. Each was to furnish the other either a certificate of title issued by the registrar of Cook county or a complete merchantable title or guaranty policy by the Chicago Title & Trust Company showing a sufficient title to the date of the contract in the respective parties, and each was to specify in detail objections to the other's title, if any.

At a meeting of the parties and their respective attorneys on April 29, 1927, they exchanged deeds, the one to the Lake Como property, however, leaving the name of the grantee in blank. At that time plaintiff's counsel submitted written objections to the title to the Lake Como property as shown by the furnished abstract thereof. In view of such objections defendants through their counsel, and with a view to removing said objections, drew an escrow receipt or agreement which was then executed by the respective parties and the escrowee. This receipt or agreement authorized the 36th Street State Bank to hold in escrow \$500 in cash and the judgment note here in question for the following express purpose:

"In the event that Joseph Neevadba and his wife cannot convey by a clear and merchantable title to Lots 6584-6585-6586 as described on map of Lake Como Beach, Walworth County, Wisconsin within sixty (60) days from the date hereof to said Frank Bezkostny and wife, then the 36th Street State Bank is authorized to deliver money held in escrow to Frank Bezkostny. Should the title be found clear in the time prescribed and title passed to Bezkostny, then said bank is authorized to redeliver the \$500 and judgment note to Joseph Neevadba and wife."

While the court, erroneously we think, refused to receive in evidence the written opinion of plaintiffs' counsel stating his objections to the title to the Lake Como lots, such an opinion being expressly provided for in the contract of exchange, it appears that the abstract of title thereto furnished by defendants contained

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no map by which it could be located or by which it could be determined that it came within the described caption of the abstract, that it brought the title down to only May 1, 1926, and showed an unreleased mortgage for \$35,000 on the whole subdivision in which the Lake Como lots were supposed to lie, thus presenting grounds for substantial objections to the title to said lots. The abstract furnished was returned to defendants with notice to produce a complete abstract and a continuation thereof. On notice to produce at the trial the abstract so furnished, one bringing the title down only to May 1, 1926, was produced by defendant's counsel "as the only one" he had.

After the expiration of the 60 days provided for in the escrow agreement, no other abstract having been produced and nothing having been done to remove said objections to the title to the Lake Como property, and defendants having received the full consideration plaintiffs were to give, and taken possession of the property conveyed to them by plaintiffs, the escrowee delivered the cash and note referred to in the receipt to plaintiffs, and this suit was brought.

The main questions raised here are as to the construction of the receipt and the admissibility of evidence tending to show what the note represented.

Appellants make the point while the escrow agreement provides for the redelivery of the cash and note to defendants by the escrowee "should the title be found clear and title passes to Benkesteyn," yet in case they cannot convey a clear or merchantable title to the lots within 60 days the escrowee was authorized to deliver only the cash; and appellants contend that testimony received purporting to explain that the note represented the value of the Lake Como lots was inadmissible as tending to vary the terms of a written instrument.

On the theory that the consideration may be explained the court, properly we think, permitted evidence to the effect that the amount of the note and cash was considered to be the value of the Lake Como property. The title to that property remained unsatisfied and unaccepted when the escrow agreement was made, and as plaintiffs had carried out their part of the agreement and conveyed their land and paid the cash required of them, and had received only two pieces of real estate in return but not title to the Lake Como lots we think the evidence was admissible. The deed for the Lake Como lots without naming a grantee had no validity. (Jennelly v. Pumanowski, 329 Ill. 482, 485; Hickey v. Barton, 194 Ill. 446.)

But if the evidence so received was not admissible as showing consideration for the escrow agreement or the contract of exchange as modified by it we think the contract so modified is capable of the construction that said note and cash were to be substituted for or taken in lieu of the Lake Como lots in case a clear and merchantable title thereto was not furnished within 60 days from the date of the escrow agreement. There was testimony by defendants' witnesses as well as plaintiffs' to that effect. But without such testimony and even without an express provision for delivery of the note as well as the cash we think the escrow agreement is capable of no other reasonable construction. Otherwise no significance can be attached to the giving of the note and holding it in escrow.

Under these circumstances we think the special pleas were not sustained and that the jury's verdict was justified.

If, as contended by appellants, the escrow agreement was not so uncertain as to render testimony as to the amount and purpose of giving of the note permissible, such testimony was not only given by one of defendants' witnesses without objection but it was harm-

less error so long as it does not vary the only reasonable construction the agreement bears upon its face. (Stone v. Mulvane, 217 Ill. 40, 46.) It is apparent, too, from the testimony given by witnesses on both sides that this construction and meaning of the escrow agreement conformed to that put upon it by the parties themselves. In such a case the court may look to the interpretation the contracting parties have put upon it, either contemporaneously or in its performance, especially where it is not inconsistent with the language used by the parties. (Walker v. I. C. B. Co., 215 Ill. 610, 619; Draiske v. Davis Celliery Co., 186 Ill. App. 291, 295.)

We find no reversible error in the admission of evidence or ruling upon instructions.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

33494

ANTON PETRICEVIC,
Appellee.

MARISA SMAJO et al.,

ON APPEAL OF PETER SMAJO,
Appellant.

2541.4.609

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim herein "is for the sum of \$350.00 advanced to defendants, at their special instance and request, as and for family necessities" in the years 1926-27 and 28.

Defendants were husband and wife. Plaintiff is her brother. Defendants entered appearance by separate attorneys. She made no defense but was called by plaintiff and permitted to testify under section 33 of the Municipal Court Act over objection of the husband's counsel. The husband filed an affidavit of merits alleging plaintiff did not furnish necessities to defendant Marisa Smajo in those years; that he turned over his weekly earnings to his wife to buy and pay for household necessities; that she through plaintiff's influence had instituted a divorce suit against him then pending and he believed they were in a conspiracy to defraud him out of his money.

Plaintiff testified that from June, 1926, until September, 1928, he lived with defendants, who had five children under working age, and observed that the mother was ill and that she and the

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children were "not adequately" fed and their clothing was ragged; that in October, 1928, she stated to him that her husband did not give her sufficient money for the support of herself and children, and that she asked plaintiff for money at that time and he "loaned" her \$40 out of which sum he knew she purchased groceries and clothing; that he thereafter "advanced various sums of money as a loan to defendant Marisa Majors for food, clothing, doctor's bills, medicine and other household and personal necessities" at her request, and that in October, 1928, he demanded of the husband the return thereof. The wife's testimony corroborated her brother's testimony in the main as to his making such loans and as to her use of the money for such purposes. She admitted having begun a suit for divorce and that she kept no account of her expenditures and could not remember all the names of persons to whom she paid the money, nor recall any specific items she purchased.

The two children of defendants, 11 and 12 years old respectively, testified that they saw their uncle hand their mother money and from time to time afterwards the mother made purchases of food and clothing for the children. But neither plaintiff nor the mother nor the children undertook to specify items or dates or places or the persons from whom purchases were made, and no tradesman from whom the alleged purchases were made was named or called to testify.

The husband testified that he earned \$39.60 a week on an average; that until a year and a half or two years before the trial he turned over his pay check every week to his wife; that since then he cashed his pay checks with John Vucas, a grocer and meat dealer whose grocery and meat bill to his wife ran between \$18 and \$23 a week and was deducted from his pay check; that he

The defendant testified that he claimed to have a good job on the day of the shooting. He said that he was working for a company that was in the process of being sold. He said that he was the only person who knew the location of the building. He said that he was the only person who knew the location of the building. He said that he was the only person who knew the location of the building.

gave most of the difference to his wife to run the household, never keeping out more than a dollar or two for himself. His testimony as to such payments to Vucas was corroborated by him and several neighbors testified that he had a good reputation as provider for his family and that they had personal knowledge of an abundance of food on his table.

While it is unexplained how and when the husband was able to save enough from his meager earnings to pay \$9,000 for a home, we need not consider the question of fact whether the husband furnished his family with adequate household necessities, or the point whether his wife's testimony was admissible. For the statement of claim and the entire evidence disclose that the suit was brought to recover money loaned and therefore is not one that comes within the provisions of section 15, ch. 68, Cahill's Ill. C. C. making expenses of the family chargeable to both husband and wife. Our statute in that respect was copied from the Iowa statute and under a familiar principle our courts have adopted the construction that was given by the Iowa courts when we adopted it. (Hudson v. King Bros., 23 Ill. App. 113; Lewis v. Lynch, 61 Id. 476.) At that time it had been held in the case of Davis v. Ritchey, 55 Ia. 719, that borrowed money used for obtaining things, which if obtained on credit, would be considered a family expense under the statute, was not a family expense under the statute even if borrowed for the family. (See also Laughlin v. Dalton, 200 Ill. App. 342.) The Act did not change the common law in that regard under which, as said in Walker v. Simpson, 42 Am. Dec. 316, "a husband can be only held liable at law for necessities furnished to his wife, and not for moneys advanced or lent to her, notwithstanding she may have laid it out in procuring necessities." (See also Jenner v. Morris, 3 Le G. J. & J. 43.)

While we think the wife's testimony against her husband is incompetent (Hyman v. Harding, 162 Ill. 359), and we would be disposed if the case were to be decided on the facts to hold that the court's finding was against the weight of the evidence and is without any basis for the amount of the judgment (\$420), yet as the pleadings and proof show the action is clearly one for money loaned, regardless of what it was spent for, the judgment must be reversed as a matter of law.

REVERSED.

Scanlan and Gridley, JJ., concur.

135827

GEORGE H. BARD et al.,
Appellees,

v.

GEORGE H. LAWRENCE, GEORGE
H. LAWRENCE and WALTER E. CARR,
Defendants.

GEORGE H. LAWRENCE and
WALTER E. CARR,
Appellants.

254-1.1.000
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INTERLOCUTORY APPEAL
FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from a temporary restraining order and injunction against performance of certain acts claimed to be in violation of a contract of which the bill seeks specific performance.

The bill is very voluminous and covers as abstracted 35 printed pages, to the sufficiency of which appellants urge 11 different points. To discuss each specifically would involve setting forth much of the bill and require a written opinion of unnecessary length. So long as we are unable to say that there are no equitable rights that can be enforced by the bill, and no basis therein for the temporary relief granted to preserve the status quo until the case may be heard upon its merits, such discussion is unnecessary. It is enough to say that the bill sufficiently states facts that require a hearing on the merits to determine whether specific performance as prayed, in some respects at least, should be granted, and that is a matter of sound judicial discretion depending in each case on the facts

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(Faint, illegible text)

This is an important document in the history of the American labor movement. It is a copy of a letter from the American Federation of Labor (AFL) to the National Labor Relations Board (NLRB) dated May 1, 1935. The letter discusses the AFL's position on the NLRB's jurisdiction over labor disputes.

and circumstances. (Dugan v. Frehlich, 229 Ill. 597.)

The bill sets forth a written contract between complainants and George R. Lawrence for the exploitation and development by complainants of certain inventions relating to aeronautics and aviation for which he had applied, and was to apply, for letters patent of the United States and of foreign countries. By the contract complainants agree to furnish money and means for such development and exploitation and said Lawrence guarantees them the exclusive right and license to manufacture, use and vend to others to be used, said inventions and improvements for the full term of any letters patent on any applications filed or that may be filed, and said Lawrence agrees to make the same and to furnish proper writings and evidence on complainants' request.

Said Lawrence covenants that he is well seized of the entire right, title and interest in and to the several inventions and improvements mentioned and that there are no outstanding rights, etc., affecting or purporting to affect his title except such as is alleged to be set forth in an attached Exhibit A which he undertakes to remove or satisfy, which however is not so attached. Complainants are to pay a salary to Lawrence for his services coming within the scope of the contract and the expenses connected with said development and exploitation not in excess of \$25,000. The bill alleges that complainants have expended already about \$20,000, and are ready, willing and able to perform all their obligations under the contract. The substance of the bill is that complainants have performed and are continuing to perform on their part and that while pursuant to the terms of the contract said Lawrence had cooperated with plaintiffs' attorneys in the preparation for drawing applications for letters patent and all incidental and necessary papers thereto and had

expressed his approval of the same he has refused and continues to refuse to sign said applications, and complainants are informed and believe said Lawrence has entered into negotiations with unknown persons with a view to making applications for letters patent for said inventions and of transferring the same or some interest therein to such unknown persons in violation of the contract, to complainants' irreparable injury.

The bill further sets out certain representations of said Lawrence and an oral arrangement made and entered into between him and complainants for the development of said inventions and what was done thereunder, including preparation of applications for letters patent, prior to executing the contract in question, but alleges that subsequently the arrangement was merged into the written contract in question.

Said representations were to the effect that Lawrence had previously filed applications for letters patent upon many of said inventions and had assigned and transferred and agreed to transfer future improvements and inventions to the Lawrence-Lewis Aeroplane Company, but represented that said company had ceased to do business, that its assets had been sold, that the applications for letters patent of the United States so assigned had been abandoned, that those obtained in foreign countries had lapsed, that there was no likelihood that any new applications Lawrence might file would be assailed, that he had a controlling interest in said company and could and would control any action necessary to remove any cloud upon his title to said inventions and improvements.

Defendants George L. Lawrence and Walter E. Carr claiming interests in said inventions together with defendant George R. Lawrence signed said contract agreeing in an addenda thereto to be bound by its terms and conditions, to join in the transfer to

[illegible][illegible]

complainant and to look to George R. Lawrence exclusively for such sums as may be due them, and releasing complainants from all liability to them. Carr only has joined George R. Lawrence in this appeal.

As we view the essential points we need not discuss said prior representations or arrangements or the relationship of the other defendants further than to say that if the order appealed from may stand as to George R. Lawrence it may by reason of the agreements of the other defendants which form part of the contract, stand as to them because of said express agreements and also because of the allegations in the bill as to alleged possible outstanding interests of said Lawrence-Lewis Aeroplane Company, and their interests as stockholders therein.

Defendants do not contend that the bill should be dismissed, and thus impliedly admit that there is some equity in the bill, though contending that complainants are not entitled to the permanent injunction nor the specific performance asked for. But as already stated, we think a hearing on the merits is necessary to determine whether and how far specific performance as asked for may be enforced, at least as far as George R. Lawrence is able to perform. (Kuhn v. Epstein, 219 Ill. 154; Lancaster v. Roberts, 144 id. 213.) The bill merely seeks that he be required to fulfill his covenants in a contract in which complainants appear to have performed theirs as far as could be done and are continuing to perform and stand willing and able to carry out their entire agreement, and that defendants be restrained in the meantime from taking any action prejudicial to complainants' rights under the contract.

Even if the bill asks for more relief than can be granted nevertheless the appeal stands as if defendants had demurred to the bill and so it impliedly admits that complainants are entitled to

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some equitable relief. The only question here is whether on its face it will support the temporary relief granted, which, so far as appellants are concerned, merely enjoins George R. Lawrence from executing any other applications for letters patent of the United States upon said inventions and improvements and from transferring the same to others than complainants and restrains Carr from any act as a stockholder of said Lawrence-Lewis Aeroplane Company from transferring or alienating the same or his stock in said company pending a hearing on the merits. It being conceded that the bill stands the same on this appeal as on a general demurrer (Dunne v. Rock Island Co., 273 Ill. 53, 58), the temporary injunction should stand upon its implied admissions if any of its claims afford a proper case for the jurisdiction of the court. (Cox v. Johnson, 242 Ill. 159, 165.) The main purpose of the bill is to enforce an agreement to assign patents or interests therein, a matter within the jurisdiction of equity. (Whitney v. Burr, 113 Ill. 379; Hills v. McHunn, 233 Id. 488; Corbin v. Tracy et al., 34 Conn. 325; Somerby v. Buntin, 118 Mass. 279.)

The contention that the contract cannot be specifically performed because lacking in mutuality is untenable in this case where it appears that complainants have performed and are continuing to perform on their part and are ready, able and willing to perform. (Gawald v. Nehls, 233 Ill. 438; Murr v. Kamen, 301 Id. 179.)

Considering the main relief prayed for is that defendant Lawrence execute the application for patent which he has approved and contrary to his express agreement has refused to sign, we deem it unnecessary to discuss at this time how far the contract is capable of enforcement in other respects, especially as to the rendition of personal services by said George R. Lawrence, and think the contract is sufficiently certain with respect to said main relief sought to compel specific performance.

As to the contention that the title to the patents in question is in the Lawrence-Lewis Aeroplane Company, and hence the contract cannot be specifically enforced against defendants, it is enough to say that both the bill and the contract allege the title to be in Lawrence. And so far as relief is sought under the written contract it is not barred by the Statute of Frauds.

We think the bill is sufficient to sustain the temporary injunction.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

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33386

HARRY A. STREET,
Plaintiff in Error,
vs.
O. L. VAN LANSINGHAM,
Defendant in Error.

254 L.A. 608⁴
SHOWN TO CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out to reverse a judgment for costs against plaintiff, rendered after verdict by the Circuit court of Cook county on May 28, 1927, in an action in assumpsit upon defendant's promissory note.

The action was commenced on January 25, 1925. Plaintiff's declaration, in addition to the common counts, consisted of a special count upon the Note, which is dated Chicago, November 1, 1922, and wherein defendant promised to pay \$2500 to plaintiff's order on or before six months after date. Plaintiff alleged that the note "is unpaid" and that there is due to him the face amount together with legal interest after maturity. Defendant filed a plea of the general issue. In his affidavit of defence he alleged that at the time of the execution of the note a written contract was entered into between the parties, whereby the plaintiff, Street, "had the alternative of retaining certain units issued by a syndicate and distributed by McCombney Company as syndicate managers, or stock in a corporation known as Equity Oil and Refining Company, or having his money returned to him with interest at 1½ per month within six months of the date of the contract and note;" and that plaintiff "exercised his option and accepted said stock in lieu of the return of his money."

Upon the trial in May, 1927, plaintiff, engaged in the lumber business in Chicago, was his only witness. During his short

examination in chief he introduced the note in evidence. He did not produce the contract or make any mention of it. Thereupon he was cross-examined at considerable length by defendant's attorney, during which the contract was produced and marked for identification and the witness was interrogated concerning it, the subsequent happenings and also concerning other writings. After plaintiff rested his case defendant, a resident of Kansas City, Mo., and in the oil business in 1922, testified, and was cross-examined at great length. He introduced various writings and documents, including the contract. Plaintiff testified in rebuttal and introduced in evidence other letters, writings and documents, and defendant testified in surrebuttal. The jury returned a verdict finding the issues for defendant and the judgment in question followed.

In the contract, dated November 3, 1922, it is provided that, in consideration of the payment of \$2500 by plaintiff (Streat) to defendant (Van Laningham), defendant agrees to repay to plaintiff said sum on or before six months after date, and to evidence said obligation further agrees to execute and deliver his note (simultaneously with the execution of this contract) for said sum, due on or before six months after date, "together with ten (10) beneficial interests denominated as units of the Equity Petroleum Syndicate;" and defendant further agrees that he will deposit with plaintiff said ten (10) units and will cause all dividends, payable on said units while the contract is in force, to be paid directly to plaintiff, "and guarantees that said dividends shall not be less than \$25 per month," and that, in case plaintiff does not receive dividends which amount to said sum per month, defendant will pay the deficiency, - it being understood that any excess over \$25 in any monthly dividend received by plaintiff will be repaid to defendant.

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It is further provided in the contract that at the expiration of six months from its date plaintiff shall receive \$2500 in cash, and in addition thereto shall retain said dividends on said ten (10) units to the extent of \$25 per month, and in addition thereto shares of the capital stock, of the par value of \$2500, of a corporation to be organized for the sum of \$1,250,000, which shall purchase all assets of said Equity Petroleum Syndicate for a sum sufficient to repay all moneys paid by Equity Syndicate unit holders (certain exceptions enumerated), together with \$750,000 of its capital stock, and which said shares of stock and said amounts of money are to be distributed among said unit holders, and the balance of the capital stock of said corporation, of the par value of \$500,000, is to be sold and the proceeds turned into its treasury.

It is further provided in the contract that plaintiff "may at his option, in lieu of receiving said \$2500 cash and said stock of the par value of \$2500, receive all the cash necessary to liquidate said corporation's obligation for five (5) of said Equity Petroleum Syndicate units and shares of stock of the par value of \$7500 in said corporation, and retain said dividends therefore received."

It is further provided in the contract that at such time as plaintiff "shall have received the cash necessary to liquidate said corporation's obligations for five (5) of the Equity Petroleum Syndicate units and the \$7500 par value of stock, together with dividends as above set forth, this contract shall be deemed fully settled and shall be cancelled, and the note "to, together with ten (10) Equity Petroleum Syndicate units, shall be surrendered and delivered up to the party of the first part (defendant.)"

It is further provided that a person shall not be

admitted to the office of a member of the board of directors

of a corporation unless he is a resident of the State of New York

and has been a resident of the State of New York for at least one year

immediately preceding the date of his election to the office of a member

of the board of directors of the corporation.

It is further provided that a person shall not be

admitted to the office of a member of the board of directors

of a corporation unless he is a resident of the State of New York

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and has been a resident of the State of New York for at least one year

immediately preceding the date of his election to the office of a member

The main issue on the trial, as stated by plaintiff's counsel in his brief here filed, was "whether plaintiff had accepted certain shares of stock in satisfaction of the note." Defendant's testimony and certain written evidence introduced by him tended to show that plaintiff did accept in satisfaction and payment of the note certain shares of stock in the corporation, which were issued to plaintiff in his name and for which he signed a registry receipt. Plaintiff, while admitting that he had received the stock, claimed that it was given to him by defendant as further collateral security to the note, and not in payment or satisfaction thereof. The transaction occurred at a time when the stock in the corporation was believed by all parties interested in it to have a considerable present value and a larger prospective value, which belief, as future developments disclosed, was not warranted. On this main issue the jury's verdict was in defendant's favor and after a careful review of the somewhat voluminous record we cannot say that their verdict is manifestly against the weight of the evidence, as plaintiff's counsel contends. No useful purpose will be served in a discussion of the conflicting evidence. We may, however, say that the facts that plaintiff requested that the stock be issued in his own name, and that it was so issued and receipted for by him, tend strongly to sustain defendant's contention that it was not received by plaintiff as collateral security for the note but in payment and satisfaction thereof.

Plaintiff's counsel also contends that the court committed prejudicial error in refusing to admit in evidence, upon defendant's objection, two letters (plaintiff's exhibits 7 and 8) and two telegrams (plaintiff's exhibits 16 and 17). Exhibit 8 is a letter written by John L. Davidson, plaintiff's attorney, to defendant. It is dated March 13, 1925, (after the present suit was commenced.) Exhibit 7 is defendant's reply letter, dated

March 31, 1928. Both letters have reference to a possible compromise and settlement of plaintiff's suit, and also a possible compromise and settlement by defendant of a somewhat similar claim, though larger, which one D. W. Baird had against him. Davidson was the attorney for both plaintiff and Baird. We do not think that the court erred in refusing to admit these letters. It is well settled that "a mere unaccepted offer to pay a sum in compromise of a suit or claim is not admissible in evidence against a party, on grounds of public policy." (Gehm v. People, 87 Ill. App. 158, 159; Paulin v. Howser, 93 Ill. 312, 315; Harber v. Bushnell, 75 Id. 220, 222; Village of Dwight v. Hayes, 150 Id. 273, 283.) In the Gehm case (p. 159) the court said: "If such offer could afterwards be given in evidence against the party making it, and used as a tacit admission of liability, no attempt to compromise a suit would ever be made." Lord Mansfield thus states the rule: "It must be permitted to all men to buy their peace without prejudice to them should the offer not succeed, such offers being made to stop litigation, without regard to whether anything is due or not. That no advantage shall be taken of offers made by way of compromise, that a party may with impunity attempt to buy his peace, are well established rules of law." Exhibit 16 is a telegram by defendant to McKinney Company, at New York, dated November 18, 1922, directing its secretary to immediately issue in the name of said Baird two certificates of 30 units each in the Equity Petroleum Syndicate and mail same to Baird at Chicago. Exhibit 17 is a reply telegram saying in effect that defendant's instructions had been carried out. We fail to see wherein these telegrams were in any way material to the issue as to Street's (plaintiff's) claim against defendant and do not think that the court erred in refusing to admit them in evidence or in refusing to allow defendant to be cross-examined concerning them.

And we do not think that the court committed prejudicial error in admitting in evidence defendant's exhibits 2, 3, 7 and 10, as counsel also contends. Exhibit 2 is a circular or prospectus, prepared about May 1, 1923, and used by McElhiney Company in selling stock in the Equity Oil & Refining Co., of which Baird was then president and Street (plaintiff) was a director and a vice-president. Attached to and forming a part of it is a copy of letter dated May 1, 1923, addressed to McElhiney Co. and signed by Baird, Street, Davidson and another. The statements in the circular are based upon the statements contained in the letter. Exhibit 3 is a letter of the corporation, dated March 31, 1924, signed by Baird, its president, and sent to all of the unit holders of the original syndicate, of which Street was one. It tended to show why said unit holders, including Street, took stock in the new company in exchange for units held by them. Exhibit 7 is another circular or prospectus issued by the corporation in February, 1924. Exhibit 10 is a letter written to defendant by the corporation, per Baird, president, dated February 11, 1924, showing the then condition of one of the company's properties. In our opinion, considering the pleadings and the main issue of fact to be decided, the contention of counsel, that said circulars and letters should not have been admitted because it was not shown that the same "had been sent by a party to the suit or for him," is lacking in substantial merit, and we do not think that the admission of the papers tended to confuse or mislead the jury, as is also argued.

Plaintiff's counsel further contends that the trial court abused its discretion in allowing an extensive cross-examination of plaintiff after the latter had merely testified to the execution of the note sued upon and that the same was unpaid. In view of the contract between the parties executed

1. The first step is to identify the problem or question that needs to be answered.

on the same day as the note, giving an option to plaintiff as above shown, and in view of defendant's defense that the note had been satisfied because plaintiff had exercised said option and accepted certain stock in the corporation in "lieu of the return of his money," we do not think that the court was guilty of any prejudicial abuse of discretion. It is well settled that "the cross-examination of a witness who is a party in interest need not be confined to the subject matter of examination in chief." (Felsenthal Co. v. Northern Assurance Co., 284 Ill. 343, 351; Hanchett v. Kimbark, 118 id. 121, 129; Brennan v. Chicago, etc. Coal Co., 241 id. 610, 622.)

And we do not think that the court erred in giving certain instructions offered by defendant, as contended. Considering all the given instructions, including those offered by plaintiff, we are of the opinion that the jury were properly and fairly instructed.

Finding no reversible error in the record the judgment of the Circuit court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlon, J., concur.

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33450

ROSE RONALEY,
Appellant,

v.

FRED RONALEY,
Appellee.

25-1 A. 610
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

Several years after a decree for separate maintenance had been entered Rose Ronaley perfected the present appeal from an order of the Circuit court of Cook county, entered January 30, 1929, wherein the court after making certain findings adjudged (a) that the rule to show cause entered against Fred Ronaley be discharged and that Rose Ronaley's petition for such rule be dismissed for want of equity; (b) that said decree for separate maintenance and all subsequent orders as to alimony, "including the order of April 23, 1928, concerning the weekly payment of alimony^{**} are hereby modified and further payments of weekly alimony are suspended and discontinued;" and (c) that Rose Ronaley "is hereby enjoined and restrained from taking any steps to enforce the payment of arrearage in alimony, found herein to be due under said decree of separate maintenance and subsequent orders * * until the further order of this court."

The parties were lawfully married at Crown Point, Indiana, on July 4, 1923. They separated on or before July 21st of the same year. On September 10, 1924, Rose Ronaley filed her bill for separate maintenance in said Circuit court. At that time both had been actual residents of Cook county, Illinois, for many years continuously.

THE STATE OF TEXAS,
COUNTY OF DALLAS.

Know all men by these presents,
that I, the undersigned,

JOHN H. HARRIS,
do hereby certify that

the within and foregoing
is a true and correct copy

of the original of the same as the same appears from the records of the County of Dallas, Texas.

Witness my hand and seal of office this 1st day of May, 1900.

JOHN H. HARRIS, County Clerk of Dallas County, Texas.

in order of the County of Dallas, Texas, and County Clerk of Dallas County, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

(a) The County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

The County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

and all subsequent orders as to alimony, including the order of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

modified and further payments of weekly alimony are authorized and the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

alimony, and (c) such other orders as to alimony, including the order of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

in alimony, and (d) such other orders as to alimony, including the order of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

in alimony, and (e) such other orders as to alimony, including the order of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

This year.

The County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

on July 4, 1900. They appeared as an order of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

year. On September 17, 1900, they appeared as an order of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

maintained in said County, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

residence of said County, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

After answer and amended cross-bill filed, and after a hearing, the court, in April, 1926, entered said decrees for separate maintenance and dismissed Fred's amended cross-bill for want of equity. After finding that Rose was living separate and apart from Fred without her fault, that she was without means of support and that he was financially able to contribute thereto, the court adjudged that she was entitled to a separate maintenance, and that Fred pay certain sums for solicitor's fees and also pay to her \$15 a week, as alimony, until further order.

On February 16, 1928, Rose filed a petition for a rule to show cause, etc., alleging that Fred had failed to pay portions of the solicitor's fees awarded, and also was in arrears in the payment of the weekly alimony in the sum of \$433. After the rule had been entered Fred, on February 21, 1928, filed a petition, praying that said decree for separate maintenance be so modified as to relieve him from further payment of weekly alimony. He alleged inter alia that at the time of the entry of said decree he was the sole owner of a going florist business at No. 322 South Wabash avenue, Chicago, which he conducted under the name of "Honsley, the Florist;" that about March, 1927, the business became insolvent and, upon demands of creditors, he incorporated it under Illinois laws under the name of "Honsley, the Florist, Inc.;" that a "relative and two friends" subscribed to nearly all of the capital stock of 75 shares (except 5 shares owned by him) and "paid into the treasury \$3000 in money and assumed the debts and obligations of petitioner connected with said business;" that thereby he ceased to be the sole owner of the business but was employed as manager thereof at a salary of \$40 a week; that he "has at the present time no property, money, or source of income other than his said salary;" that by reason of his changed financial condition he is unable to pay his living expenses and also "make a small necessary weekly

contribution to the support of his widowed mother" and also obey the court's order to pay to his wife the sum of \$15 a week; that she has constantly "harrassed and annoyed" him by citations into court (stating instances) thereby causing him to be absent from his business; that as a result he "has become ill and broken in health" and "on one occasion was obliged to leave Chicago for 30 days in order to rest and recuperate his shattered nerves and health;" that prior to the marriage Rose was a clerk or bookkeeper and earned for herself a livelihood; that since the marriage and the entry of the decree for separate maintenance she has had such health and such skill and ability as to properly provide for her temporal needs without any assistance from him; that she is now living with her father in Chicago and is engaged in business with her sister and earning \$10 per week; that "petitioner intends and will, at the earliest possible moment when able, pay to said Rose Hensley all sums of money now in arrears under said decree," but that, by reason of his changed financial condition he is unable to pay to her any alimony to accrue in the future; and that "because of her acts and doings as above mentioned," she ought not to have the aid of a court of equity.

In her answer to the petition she alleged that the incorporation of said business was for the purpose of concealing her husband's assets and that he is amply able to pay weekly alimony and all accrued alimony; that he "has instituted against her a suit for divorce in the foreign jurisdiction of Mexico and has procured an alleged decree there, all in defiance of the jurisdiction and orders of this court;" that she has no skill or training in any work, save in that in which she was employed by him in his business prior to the marriage; that there has been no substantial change in either his or her financial condition since the entry of the decree for separate maintenance; that as to the weekly payments of alimony he has defied

the court's order, and has recently stated to friends and relatives of respondent that he will not make any further payments unless compelled so to do; that he has had five different attorneys representing him and that, as one ceases to act for him in motions to avoid further payments, he employs a new attorney; and that the rental paid for the premises where said florist business is conducted is \$1000 a month.

After a hearing of evidence in open court upon the petition and answer the chancellor entered the order of April 23, 1928, in which, after making many findings (among them that there was then due and unpaid to Rose Monsley for accrued alimony and solicitor's fees the total sum of \$768), it was adjudged that he pay said sum in monthly installments thereafter of \$15, and until said installments aggregated \$768; that the decree of separate maintenance be so modified that the \$15 therein provided to be paid each week be reduced to \$5 a week; and that on each Monday thereafter he pay to her said sum of \$5, "until the further order of the Court."

During December, 1928, Rose Monsley filed a verified petition praying that Fred be ruled to show cause why he should not be punished for contempt for failure to comply with said order of April 23, 1928. After setting forth the provisions of the order she alleged that Fred had refused to comply with its terms; that he ^{had} paid to her only the aggregate sum of \$92; that his refusal to make other accrued payments were wilful and contumacious; that he was earning more money than at the time said order was entered; that he was living in adultery with one Jeannette Wellner, as his purported wife, to whom he owes no obligation until he has discharged his obligations to petitioner. Fred filed an answer to the petition.

During the same month (December, 1928) Fred filed a petition, praying that said order of April 23, 1928, "be modified in such a manner as to relieve him from further payment of weekly

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alimony or of arrearages in alimony." He alleged that from the date of the entry of said order and until June 30, 1928, he continued to receive his weekly salary of \$40 from the corporation; that during said period "the malady afflicting him progressively increased" to such an extent that he could give only a few hours a day to its business, and as a result it employed another man as manager and reduced petitioner's salary to \$20 a week, which sum he accepted and received weekly thereafter; that he uses all of said salary, which is his only income, for his living expenses and in payment of physician's bills; and that since said date he has been unable to make payments to his wife of \$15 a month and \$5 a week, as provided in the order of April 23, 1928. Rose filed an answer to the petition denying its material averments and alleging that said corporation's business is really owned and managed by Fred, who pretends that it is owned by his brother "and by one Victor Tollner, a brother of Jeannette Tollner," with whom Fred is now and has been for over two years living in a state of adultery; and that he is in no position to demand of a court of equity any modification of said order of April 23, 1928.

During January, 1929, there was a hearing in open court upon the two last mentioned petitions and answers thereto. Fred Ronsley was a witness in his own behalf and he called as witnesses for him Dorothy Rose, bookkeeper for said florist business for about five years, and Victor E. Frankenstein, a physician. Rose Ronsley testifiedⁱⁿ her own behalf and she called as a witness Lena Tollner, mother of Jeannette Tollner. At the conclusion of the hearing the court entered the order appealed from, as first above mentioned.

During the cross-examination of Fred Ronsley, after he had testified that when his salary for his services rendered to the corporation had been reduced from \$40 to \$20 a week he talked with Victor Tollner, brother of Jeannette Tollner and president of said corporation, he was asked if Tollner was a relative of his, and he answered: "I

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don't know if he is a relation of mine or not. I thought I was married before. Now Mr. Kriete (his attorney) tells me there is some doubt about my Mexican divorce, so I don't know whether he (Wellner) is my brother-in-law or not." The last sentence of the answer was, on motion of his attorney, stricken out by the court on the theory that it had no bearing on the issue before the court, viz, Honsley's financial ability to comply with the court's order of April 23, 1928. After further testifying that he was living in an apartment at No. 8952 Lakewood avenue, Chicago, the lease of which was in the name of Mrs. Lena Wellner, mother of Jeannette Wellner, and that both of the last named were also living in said apartment, he was not allowed by the court to answer the following question: "Did you and Jeannette Wellner go through a marriage ceremony at any time since the entry of the separate maintenance decree in this case?" Thereupon the solicitor for Rose Honsley offered to show by the witness that he (the witness) had entered into a purported marriage ceremony with said Jeannette Wellner, claiming to rely upon a fraudulent decree of divorce, rendered in Mexico after the filing of Rose Honsley's bill for separate maintenance. The solicitor stated in substance that the purported testimony was competent and material as tending to show Fred Honsley's attitude towards and disregard for the decrees of the court and also as bearing upon the question of his present financial ability to comply with the court's order of April 23, 1928, as regards alimony payments. The court refused the offer and ruled that any testimony along this line would not be admitted.

When Lena Wellner was on the stand she testified that Fred Honsley had lived in her apartment on Lakewood avenue for a year and a half; and that her daughter, Jeannette Wellner and said Honsley "have a room together in common there." She was then asked "if her daughter and Honsley were married or had gone through a marriage

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ceremony?" Upon objection made the court would not allow her to answer the question. Thereupon Rose Honsley's solicitor made a similar offer of proof and for similar reasons, as stated when Fred Honsley was on the stand.

After reviewing the pleadings in the present case and the evidence contained in the present transcript we are of the opinion that the court erred in refusing to admit the offered testimony as above mentioned and further testimony along the same line. We think it had a decided bearing upon the question whether Fred Honsley was in any position to ask a court of equity for any modification of the court's order of April 23, 1928, and upon the question as to his present financial ability to comply fully with the terms of that order.

Accordingly, the order of the Circuit court of January 30, 1929, appealed from, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

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In re estate of HARRY THEOLOGES,
deceased,

JOSEPH COWEN,
Claimant and Appellant,

v.

STELLA THEOLOGES and FRANK MOLAND,
administrators of said estate,
Appellees.

254 I.A. 610²

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY,

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 27, 1928, the probate court of Cook County allowed the claim of Joseph Cowen for \$500 against the estate of Harry Theologes, deceased, to be paid in due course of administration. The administrators appealed to the circuit court, and after a trial de novo, without a jury, the circuit court, on January 30, 1929, found the issues against the claimant and entered a judgment against him for costs. The present appeal followed.

The claim, filed in the probate court in May, 1926, alleges that the claimant is entitled to the sum of \$500, "being earnest money deposited by him" upon a contract for the purchase of certain real estate in Cook County (describing it); that the contract is dated March 12, 1926, and is executed by Harry Theologes as seller and by the claimant as purchaser; that neither Theologes nor any one in his behalf ever tendered a warranty deed to the claimant conveying said premises; and that neither he nor anyone in his behalf "could at any time deliver title to the premises, as per terms and conditions of said contract."

On the trial in the circuit court the claimant introduced the contract, also a certain letter or notice, dated April 6, 1926,

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signed by Theologes and addressed to and received by the claimant; also two letters, dated respectively April 12th and April 20th, 1926, addressed to Theologes and signed by Isadore Becker, then, and now in this appellate court, acting as the attorney of the claimant. After the parties had stipulated in open court that the \$500 had been paid to Theologes when the contract was signed, and was thereafter retained by him, and that he had never formally tendered to Joseph Cowen any deed to the premises, the claimant rested his case. Thereupon William B. Jordan, a real estate agent and a representative of Theologes in the negotiation of the contract and in certain subsequent negotiations and happenings, testified for the estate. Erwin S. Cowen, an attorney-at-law and a representative of the claimant, testified in rebuttal. Becker did not testify.

The contract (which is partly printed and partly in typewriting) provides that "Joseph Cowen, or his assigns, hereby agrees to purchase at the price of \$24,400" the real estate described; that Theologes "agrees to sell said premises at said price and to convey to said purchaser a good and merchantable title thereto, by a general warranty deed, * * but subject to * * all taxes and assessments levied after the year 1925, * * and to a first mortgage of \$4500, * * maturing on or before April 1, 1927;" that said first mortgage is a part of the purchase price; that premiums on insurance policies held by the mortgagee shall be paid for by the purchaser pro rata for the unexpired time; that "said purchaser has paid \$500, as earnest money, to be applied on such purchase when consummated, and agrees to pay, within 15 days after the title has been examined and found good or accepted by him, said insurance premiums and the further sum of \$11,540, at the office of * * Cowen, Burnham Bldg., Chicago, provided a good and sufficient general warranty deed, conveying to said purchaser a good and merchantable title to said

premises (subject as aforesaid) shall then be ready for delivery;" and that the balance of the purchase price is to be paid by the purchaser "by the assumption and payment of the above described first mortgage, and by the purchaser agreeing to execute a second mortgage in the sum of \$7940, bearing interest, * * and maturing on or before April 1, 1928." At the bottom of the printed form of the contract, and immediately to the left of the signatures, are written in type-writing the following provisions: "The seller has signed this contract with the understanding that this contract is subject to a previous contract for the purchase of this property by the within named seller, and that the previous contract is now held by the secret dept. of the Chicago, Title & Trust Co., secret No. 69,906. Purchaser to accept title direct from previous seller, as per terms and provisions herein mentioned." In the body of the contract, and in small printed type, are the following provisions:

"A certificate of title issued by the Registrar of Titles of Cook County, or complete merchantable abstract of title or merchantable copy brought down to date hereof, or merchantable Title Guaranty Policy made by Chicago Title & Trust Co., shall be furnished by the vendor within a reasonable time, * *. The purchaser or his attorney, if an abstract or copy be furnished, shall, within 30 days after receiving such abstract, deliver to the vendor or his agent a note or memorandum in writing, signed by him or his attorney, specifying in detail the objections he makes to the title, if any; or, if none, then stating in substance that the same is satisfactory."

"Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be retained by the vendor as liquidated damages, and this contract shall thereupon become and be null and void. Time is of the essence of this contract, and of all the conditions hereof."

Theologes' letter of April 6, 1926, addressed to the claimant, in care of said E. E. Cowen at the latter's Chicago office, is in the nature of a formal notice that, pursuant to the terms of the contract or agreement of March 12, 1926, the title to the real estate has been found merchantable more than 10 days ago, as per muniments of title furnished to the buyer (Joseph Cowen) by

Theologes; that "you will appear at the Escrow Department of the Chicago Title & Trust Co." (giving its location) "on Tuesday, April 13, 1926, at 3 o'clock p. m., for the purpose of carrying out the terms imposed on the undersigned (Theologes) in closing the deal set forth in said agreement," and that "your failure to so appear and close said deal will, under said agreement, cause the earnest money to be forfeited and your rights under said agreement to be concluded and determined."

Becker's letter of April 12, 1926, is a reply to Theologes' letter or notice of April 6th and he writes: "Mr. Joseph Cowen has turned over to me for reply the notice directed to him * * *. Permit me to advise you that under the terms of the contract my client has 30 days after receipt of abstract or letter of opinion from Chicago Title & Trust Co. to examine the title and to render a copy of opinion to you; and further that, under the terms of the contract, my client has a period of 15 days, after the rendition of the opinion of title, within which to close the deal. The letter of opinion from the Chicago Title and Trust Co. was delivered to my client on March 20, 1926; therefore, he has until April 20, 1926, in which to examine title and render opinion, and 15 days thereafter to consummate the deal."

Becker's letter to Theologes of April 20, 1926, is to the effect that he, on behalf of the purchaser (Joseph Cowen) had examined the "letter of opinion" of said Trust Co., concerning the title to the premises, and that "I find that substantially good title in fee simple was and is vested in the Chicago Title & Trust Co., Trustee, and that there are no material defects in said title."

The testimony of William M. Jordan, Theologes' representative in promoting the deal, is to the effect that "he phoned Erwin Cowen several times to close the deal and he put me off;" that in the early part of April, 1926, he phoned said Cowen 5 or 6 times and asked him

to close the deal and he said "he had other details to clear;" that in the latter part of April he met Cowen, Becker and Cangelosi at the Escrow Department of the trust company, that he handed Cowen a policy covering the premises but that Cowen said he would not then close the deal; that he (the witness) "had a deed there;" that subsequently he (the witness) got another letter of opinion, dated May 6, 1936, from said trust company as to the then title to the premises, and he took it to Cowen at the latter's office, showed it to him, and asked him to close the deal but Cowen refused; that Becker was there and "Becker said that the way they had to buy the property from them had backed out on account of a slump in the market and that they would not close the deal;" that "Cowen then asked me if I could get the earnest money back, and said that he would treat me right if I could get Theologos to return the money;" that in the negotiation of the deal "no abstract was ever delivered" but that the contract "provided for a guaranty policy."

During the hearing of Jordan's testimony the estate introduced in evidence, (as Estate's Exhibit 1) an opinion of title to the premises, signed by the Chicago Title & Trust Co., which stated that on May 6, 1936, the title was in Peter Cangelosi, subject to the first mortgage (mentioned in the contract in question) and certain other enumerated items, and which further stated that "this examination is made in connection with application No. 1102323, for owner's policy in the sum of \$23,000."

The only testimony offered in rebuttal by the claimant was that of Erwin E. Cowen, who stated on direct examination that sometime during the latter part of March he, Theologos and Jordan met by appointment at the escrow department of the trust company; that Jordan then demanded that the purchaser consummate the contract; that he (Erwin Cowen) told Jordan that "under the contract we had 30 days in which to examine the opinion of title and 15 days

thereafter to close the deal if the title was found good; that he (Jordan) had no right to demand that we close the deal before that time, and that we would close it before the time expired;" that the letter of opinion of title of the trust company, then delivered to him for examination, was only brought down to several days prior to the date of the contract in question (March 12, 1926) and he demanded that it be continued down to said date; that he never thereafter received "such continuation;" that he had an interview in his office with Jordan on May 7th or 8th (when Jordan finally demanded the closing of the deal); that he was not then shown said opinion of title of the trust company (estate's exhibit 1) and that he never saw it until produced on the trial; that "Becker did not tell Jordan at that meeting that we did not want to close the deal;" that he (the witness) "did the talking" and that he "did not then say that we would not go through with the deal;" that at a previous meeting with representatives of the trust company he (the witness) "told them they were wrong," and further "told them to bring the title down to date," and "demanded that we be given the time provided for in the contract to close the deal." On cross-examination his answers were evasive and unsatisfactory. On being asked if it was not a fact that the claimant did not desire to consummate the contract according to its terms "because there was a slump in the market," he replied that "there was no slump in the market at that time; the slump did not come until a year later." On being asked if it was not a fact that the claimant did not consummate the contract because of the lack of the necessary money, he replied: "On the day Theologes wanted to close the deal we did not have the money, but I told Jordan that under the contract he could not then compel us to close the deal and that before the contract expired we would be ready to close it."

One of the contentions of claimant's counsel is that the finding and judgment of the circuit court is against the weight

of the evidence. We cannot agree with the contention. We think that a preponderance of the evidence discloses that the claimant either could not or would not consummate the contract, after having been given many opportunities to do so ^{and} after there had been tendered to him, or to his representative, a title to the premises, which was satisfactory to Becker (as disclosed from Becker's letter of April 20th), and also a merchantable policy of the trust company guaranteeing the title. And it further appears that the claimant, as the proposed purchaser, "failed to perform the contract promptly on his part." and the contract provided that in such event the "earnest money" (i.e., the \$500 paid by the claimant when the contract was signed and herein sought to be recovered back from Theologes' estate) "shall at the option of the vendor be retained by the vendor as liquidated damages," and the contract became null and void, - time being of the essence of the contract. (See Theeler v. Mather, 36 Ill. 241, 250; 39 N. L. W. (note) p. 194; Telf v. Lake, 178 Ill. App. 340, 344.)

Claimant's counsel also here contends that the judgment should be reversed, because (a) Theologes in his lifetime never formally tendered to the proposed purchaser (the present claimant) a deed to the premises, and (b) no abstract of title was ever furnished to him or his representative. In our opinion the contentions are without merit. It clearly appears that a formal tender of a deed would have been unavailing and useless. Furthermore, it appears from Jordan's testimony that when, in the latter part of April, 1926, a guaranty policy was tendered, a deed of conveyance was ready for delivery. Furthermore, the contract provided that "a merchantable abstract of title or merchantable Title Guaranty Policy," made by said trust company, "shall be furnished by the vendor within a reasonable time." It was not necessary under the contract that any

abstract of title be furnished, if a title guaranty policy was furnished to the proposed purchaser, and it sufficiently appears that such a policy was actually tendered to the purchaser or his representative within a reasonable time, and, further, that as early as April 20, 1928, the proposed purchaser's attorney, Becker, expressed himself by letter that the title as tendered was satisfactory to him.

The judgment of the Circuit court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, F. J., and Scanlan, J., concur.

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35471

G. W. BRAINARD, as Trustee in
Bankruptcy of Globe Auto Supply
Corporation,
Appellant.

v.

MONDIE FROELICH and
LOUIS HANSBACH,
Appellees.

254 I.A. 610
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in contract, commenced in the municipal court on September 17, 1926, plaintiff, as Trustee in bankruptcy of the Globe Auto Supply Corporation, sought to recover from defendants certain moneys because of various happenings and because of certain provisions in a written lease, dated June 16, 1924, whereby said corporation became a tenant of certain premises in Chicago of defendants, the lessors. To plaintiff's original statement of claim defendants filed an amended affidavit of merits. On July 14, 1927, on plaintiff's motion, portions of the affidavit were stricken and the court entered a partial judgment against defendant for \$2231, "reserving for future determination and adjudication the matter of the balance of plaintiff's demand." From the judgment defendants appealed to this appellate court, and on April 3, 1928, the judgment was reversed and the cause remanded for a trial upon the merits. (Brainard v. Froelich, 248 Ill. App. 650.)

On June 26, 1928, after the cause had been re-docketed in the municipal court, plaintiff filed an amended statement of claim, to which defendants filed an affidavit of merits. During

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U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

1. The first class of cases is that in which the defendant is a person who is a member of a group or organization which is known to be engaged in criminal activity. In such cases, the defendant is usually charged with a crime which is a part of the group's or organization's activities. The defendant is usually charged with a crime which is a part of the group's or organization's activities.

On June 22, 1964, the following information was received from the Bureau of the Census, Washington, D.C.:

January, 1923, there was a trial without a jury, resulting in the court finding the issue against plaintiff. Judgment on the finding was entered against him and the present appeal followed.

In his amended statement of claim plaintiff alleged that on and prior to June 16, 1924, the Globe Auto Supply Corporation (hereinafter referred to as the Globe Corp.) was a California corporation, duly authorized to do business in Illinois, and that on June 16, 1924, it, as lessee, leased from defendants certain portions of a two-story building at Nos. 1210-12 South Michigan Avenue, Chicago, up to and including April 29, 1927, at a rental of \$350 per month, payable in advance. A copy of the lease and rider thereof is attached to and made a part of the statement of claim as Exhibit A. The lease contains the usual provisions. In paragraph 3 of the rider the Globe Corp., as second party, agrees to run and maintain the heating apparatus in the basement so as to furnish heat to the building when necessary during business hours; to run and maintain the machinery operating the elevator; to furnish hot water to the building as at present; and to pay all electric light bills, etc. In paragraph 7 of the rider it is stated that the Globe Corp., as second party, "has delivered to the parties of the first part its six (6) judgment notes each for \$500 of even date, the first of said notes maturing on or before October 15, 1924, and the remaining five (5) of said notes maturing on or before the 15th day of successive months thereafter." And in said paragraph it is provided:

"The total amount of Three Thousand Three Hundred Dollars (\$3,300) to be paid to parties of the first part in payment of said notes shall be held and retained by parties of the first part as a deposit and as security to them for the payment of rental under this lease and to be applied by parties of the first part in payment of the last six months' rental that shall fall due under this lease; and parties of the first part shall allow party of the second part six per cent (6%) annual interest upon said

deposit and the installments thereof from the time of receipt, to be applied against the rent first falling due thereafter and hereunder; and in case of default by party of the second part in payment of any rent due hereunder and if such default shall continue for ten (10) days after written notice thereof shall be given by parties of the first part to party of the second part by telegram or registered letter to its main California office, then said sum of Three Thousand Three Hundred Dollars (\$3,300) shall be forfeited to the parties of the first part as their liquidated damages by reason of such default."

In the statement of claim plaintiff further alleged in substance that, pursuant to the lease, the Globe Corp. delivered to defendants the six judgment notes; that it paid to them the amounts of the first three of said notes, aggregating \$1650; that on July 15, 1925, in a district court of the United States in California, an involuntary petition in bankruptcy was filed by three creditors of the Globe Corp. to have it adjudicated a bankrupt; that on September 23, 1925, it was there adjudicated a bankrupt; that "thereafter, but prior to the institution of this suit," plaintiff was duly elected as Trustee in bankruptcy, and he qualified and is still acting as such; that defendants caused a judgment by confession to be entered against the Globe Corp. on said three remaining judgment notes (aggregating \$1650) in the total sum of \$1734.75, including interest, costs and expenses, and also caused a levy to be made on certain of its merchandise and property in Chicago to satisfy the judgment, and arranged for a judicial sale of the property; that "on or about August 11, 1925" (i.e., prior to the Globe Corp's adjudication as a bankrupt and prior to plaintiff's election and qualification as trustee in bankruptcy), "plaintiff, by his agents, caused to be paid to defendants under protest" the amount of said judgment of \$1734.75, in order that the levy might be released and the sale avoided; that the monthly rent for the premises in question, "including the month of August, 1925," has been fully paid to defendants; that "on or about August 8, 1925," the property and assets of the Globe Corp. in Chicago were sold to one

Sam Weisman, doing business as the Douglass Auto Supply Co.; that on or about the same day "plaintiff, by his agents, presented to defendants a prospective tenant, who was then and there ready and able to take over the premises for the unexpired portion of said lease under the same terms and conditions as therein stipulated;" that defendants then and there refused to accept the proposed tenant, but did thereafter enter into a binding lease with him at a higher rental than \$850 per month; that thereafter defendants by a telegram (copy attached and made part of the statement of claim as Exhibit B) "did terminate the lease in question and declare the term and leasehold ended;" and that defendants, although often requested, have refused to pay to plaintiff as trustee "the money deposited with them and paid to them under protest as aforesaid." Plaintiff claimed that there was due to him as trustee from defendants the total sum of \$3,586.07. This sum is made up of the \$1650 received by them on said first three judgment notes; the paid judgment on the last three judgment notes of \$1734.78; and various costs and items of interest aggregating \$201.32. The copy of defendants' telegram (Exhibit B), dated September 17, 1928, and sent to and received by the Globe Corp. at its main California office in San Francisco, is as follows: "You are hereby notified that, owing to your failure to pay the rent in the sum of \$850 for the month of September, 1928, for premises at 1210-12 South Michigan Avenue, Chicago, which payment was duly demanded of you, we have elected to terminate your lease and forfeit your deposit, as provided in said lease."

In defendants' affidavit of merits they admitted the execution of the lease and rider of June 16, 1924; the execution and delivery to them of the six judgment notes aggregating \$3300; the payment by the Globe Corp. to them of the amounts of the first three of the notes, \$1650; its tenancy of the premises and the payment by it of the stipulated rent up to and including the month

of August, 1925; and the determination of the lease and tenancy because of the failure of the Globe Corp. to pay the rent for September, 1925. They alleged that the "deposit," mentioned in plaintiff's statement of claim, was agreed by the parties "to be for liquidated damages in case said Globe Corp. should default in any of the terms of said lease." They denied that plaintiff, on August 8, 1925, or at any other time, presented to them any prospective tenant for the premises. They alleged in substance that after September, 1925, they were compelled to and did re-rent the premises to another party for the unexpired term (until April 29, 1927) at a monthly lease in rent of \$50. They set forth various other items of costs expended and damages sustained by them by reason of the default of the Globe Corp. They denied that plaintiff's alleged claim was an asset of the bankrupt's estate at the time of the beginning of this suit; denied that either plaintiff or the bankrupt estate on August 11, 1925, or at any other time, paid to them the amount of said judgment of \$1734.75, as confessed on said last three judgment notes; and denied that they were indebted to plaintiff, as trustee, etc., in any sum.

On the trial plaintiff contended in substance, and contends here, that under the provisions of paragraph 7 of the rider of the lease defendants were not entitled to retain as liquidated damages (as against plaintiff, trustee in bankruptcy of the Globe Corp.) either the \$1650 received on the first three notes, or the \$1734.75 received when the judgment (as confessed on the last three notes) was paid to them; that the provisions of said paragraph should be construed as providing for a penalty; and that defendants could retain no more than their actual damages. That the paragraph should be construed as providing for a penalty we think admits of no doubt. In Advance Amusement Co. v. Franke, 260 Ill. 579, 631-2, it is said: "The courts of this State, as well as in other juris-

dictions, lean towards a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained. * * This and all other courts seem to agree upon the principle that a stipulated sum will not be allowed as liquidated damages unless it may be fairly allowed as compensation for the breach." (See, also, Ray Gas Amusement Co. v. Cave, 177 Ill. App. 250, 255; Virginia Amusement Co. v. Mid City Bank, 220 Ill. App. 147, 152; Johnson v. Englestein, 236 Ill. App. 215, 220.)

As to the sum of \$1680 received by defendants from the Globe Corp. in payment of said first three notes, we do not think that it or any part thereof can be recovered back by the plaintiff, as trustee in bankruptcy of the Globe Corp., because the undisputed evidence discloses that defendants suffered damages, by reason of the default of the Globe Corp., considerably in excess of said sum. The lease to the Globe Corp. did not expire until April 29, 1927. The last payment of rent on the lease was for the month of August, 1925. Defendants did not receive any rent from anybody for the month of September, 1925, amounting to \$650. During August, 1925, or prior thereto, agents of creditors of the Globe Corp. took possession of its property and assets contained in the premises (under what proceedings is not disclosed) and during August or September, 1925, said assets were sold to one Sam Weisman and the premises were abandoned by the Globe Corp. During September, 1925, defendants made a new lease (introduced in evidence) of the premises to Weisman, expiring April 29, 1927, at a monthly rental of \$500 (\$80 per month less than that stipulated to be paid by the Globe Corp.) Weisman took possession of the premises under the new lease about October 1, 1925, and the first rent he paid was for that month, \$500. Morris Freshlich, one of the defendants, testified in substance that defendants, under the then existing circumstances, were compelled to lease the premises to

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Witness at \$800 per month for the unexpired term and that he refused to pay any larger sum. There were 18 months remaining of the term of the original lease, or a loss of rent to defendants amounting to \$960. Froehlich further testified that defendants were compelled to disburse and did disburse out of their funds \$178 for coal and \$114 for elevator service. These were amounts which should have been paid by the Globe Corp. under the provisions of paragraph 3 of the rider to its lease. The above mentioned items aggregate \$1792. And there was some evidence that defendants had suffered further damages by reason of the default of the Globe Corp.

And we do not think that plaintiff, as trustee in bankruptcy of the Globe Corp., is in any position under the evidence to recover back from defendants the amount of \$1734.75 (or any part thereof), which defendants received from some one during August, 1925, in satisfaction of the judgment in that amount, so confessed as stated against the Globe Corp. on the last three of said judgment notes aggregating \$1650. It does not appear that the Globe Corp. or any creditor thereof or any other interested party, made any attempt to have said judgment set aside, but on the contrary it does appear that the "Chicago Association of Credit Men," evidently at the behest of certain creditors of the Globe Corp., elected to pay, and did pay (though under protest), to defendants the amount of said judgment. At the time this payment was made the Globe Corp. had not been adjudicated a bankrupt. It was not so adjudicated in the U. S. Court in California until September 23, 1925, and plaintiff was not appointed trustee of said bankrupt estate until October 3, 1925. And it does not appear that the amount of the judgment of \$1734.75, so paid to defendants, was paid out of funds belonging to the Globe Corp., or ultimately by the bankrupt estate of which plaintiff is the trustee.

On the trial one of defendants' contentions (apparently

sanctioned by the trial court) was that they were entitled to a finding and judgment in their favor on the theory of "liquidated damages." While for the reasons first above stated we cannot agree with this contention, we nevertheless are of the opinion that the trial court's finding against plaintiff was correct and that the judgment for costs against plaintiff should be affirmed. The fact that certain portions of the testimony of defendant's witness, Maurice Copeland, president of the Globe Corp. in 1928, were as we think erroneously admitted, because tending to vary the terms of the written contract between the parties, does not require the reversal of the judgment in question, which is otherwise sufficiently sustained by the law and the evidence.

The judgment of the Municipal court against plaintiff should be and is affirmed:

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

4. *Chlorophyll a* and *Chlorophyll b* contents were determined by the method of Arar and Collins (1971).

35497

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

PETER VLACHOS,
Plaintiff in Error.

4
20-2-1-10
ERROR TO CRIMINAL
COURT, COOK COUNTY.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Peter Vlahos seeks to reverse a judgment of the Criminal court of Cook county, rendered against him on February 27, 1929, wherein he was adjudged guilty of the crime of conspiracy in manner and form as charged in the indictment and sentenced to the Joliet penitentiary for a term from one to five years.

The indictment, filed December 20, 1928, consisted of two counts and each charged in substance that on October 15, 1928, in said Cook county, Peter Vlahos, Theodore Brown, Thomas Mortell and Joseph Myers did unlawfully, etc., conspire and agree together, and with one Alexander Pomasas, with fraudulent and malicious intent, etc., to injure the person of one George Penezis, by an assault and battery upon him, etc., contrary to the statute, etc.

The cause came on for hearing on February 27, 1929. The clerk's record discloses inter alia that on that day Vlahos, being duly arraigned and being represented by counsel, pleaded "not guilty;" that thereupon, upon motion of the State's attorney for a severance, the court ordered that said other defendants, Brown, Mortell and Myers, be given a separate trial; that thereupon the court denied Vlahos' motion for a continuance of the

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trial as to him; that thereupon by leave of court Vlahos in open court withdrew his plea of not guilty and pleaded "guilty;" that, "he being fully advised by the court of the effect in rendering said plea, and he still persisting therein," the court ordered that his said plea of guilty be accepted and entered of record; that thereupon the court, after hearing the testimony of witnesses and arguments of counsel, found Vlahos guilty of conspiracy, etc., in manner and form as charged in the indictment, and further found that he was of the age of 40 years; and that, after motions for a new trial and in arrest of judgment had been overruled, the court entered the judgment in question.

As to the proceedings in court on February 27, 1929, the bill of exceptions discloses that, after the severance had been made and Vlahos' motion for a continuance had been denied, the court directed the clerk to call a jury to try Vlahos separately; that thereupon there was "a discussion between court and counsel and defendant in a low tone;" and that thereafter the court said: "The plea of not guilty is withdrawn and a plea of guilty is entered. The court has advised the defendant fully of the situation. He makes the plea because he is guilty. Gentlemen of the jury, you will return to your seats. There has been a change in the plea from 'not guilty' to 'guilty.' That means the court will try it." The bill of exceptions further discloses that thereupon, on behalf of the People, the State's attorney called as witnesses George Penasie (complaining witness) and said Thomas Mortell and Joseph Myers; that all testified at considerable length; that afterwards Vlahos testified in his own behalf and also called certain character witnesses; and that immediately at the conclusion of the hearing the court entered the finding and judgment mentioned.

The bill of exceptions further discloses that two days

thereafter and within the same term of court Vlahos, by his attorney, appeared before the same judge and moved (1) that the judgment of February 27, 1929, be vacated and that he be allowed to withdraw his plea of guilty, and (2) that the court amend the clerk's record so that it speak the truth, in reference to that part of the judgment order wherein it is stated that "defendant was duly warned and persisted in his plea of guilty." The court ordered that said motions be entered and continued for hearing until March 8, 1929.

The bill of exceptions further discloses that the hearing on said motions was had in open court on March 8, 1929; that the court first considered the motion to amend the record so that it speak the truth; that the judge of his own motion called as a witness the court clerk, William T. Collins, who testified as to his drafting of the record of the judgment order of February 27, 1929, substantially the same as above mentioned; and that thereupon the court stated that his (the court's) minutes, made on February 27, 1929, during the hearing of the case, showed that defendant's plea of not guilty was withdrawn, that defendant then pleaded guilty to the indictment, that there was "a warning by the court that a plea of guilty must be made only because of the guilt of the defendant and that no promises had been made," that the defendant persisted in his plea of guilty, and that thereafter testimony was taken in open court, etc. The judge thereupon called as a witness Robert E. Woodward, one of Vlahos' attorneys, and he gave his version of what transpired on February 27, 1929. The judge also called as a witness Tom Salariotis, who had acted as an interpreter during the trial. He testified in substance in response to questions asked by the judge that he remembered the court requesting him to "translate into Greek" and to tell to Vlahos in that

language what the court had said to Vlahos in the English language; that he remembered that "it was about his plea of guilty;" that he (the witness) asked Vlahos: "Do you want to have trial by jury? If you try by the jury that means don't plead guilty. What do you decide about it?" and he (Vlahos) said: "I decide to try case with the judge." On further examination by the attorney for defendant, Zalarotis testified: "I didn't tell Peter Vlahos that morning that he could be sentenced from one to five years in the penitentiary, and I didn't tell him anything about punishment if he pleaded guilty." Immediately following this testimony the court said: "Let the record show that the court did not tell him anything about what the punishment would be, and that the court has no recollection or memoranda to the effect that at that time anyone told him what the sentence would be or might be under the indictment." And thereupon Vlahos was called to the stand and testified in substance that on that morning nobody explained to him what the consequences would be if he pleaded guilty, or that he could be sentenced from one to five years in the penitentiary; that he "knew nothing about it;" that he "didn't understand it at all;" that his attorney did not tell him what the penalty was for conspiracy; and that when he gave testimony that morning he gave it in English. And thereupon the court denied the motion to vacate the judgment of February 27, 1949, and to allow Vlahos to withdraw his plea of guilty, and also denied the motion that the clerk's record be amended, etc.

The main contention of Vlahos' counsel, here made and relied upon for a reversal of the judgment, is that the transcript does not sufficiently disclose that the court fully explained to Vlahos the "consequences" of entering his plea of guilty on February 27, 1949. After reviewing the entire transcript we are of the opinion that the contention has substantial merit. In section 4

of division 13 of our Criminal Code (Cahill's Stat. 1947, Chap. 36, par. 756, p. 952) it is provided:

"In cases where the party pleads 'guilty', such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea; after which, if the party persist in pleading 'guilty', such plea shall be received and recorded, and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense."

In Wroslage v. People, 224 Ill. 486, 498-80, it is said:

"The foregoing section of the statute was evidently passed for the purpose of securing to a person charged with crime the right to a trial by jury unless he should, after an opportunity to fully and fairly understand the consequences of a plea of guilty, waive that right. * * The plea can only be entered after the defendant has been fully advised by the court of his rights and the consequences of his plea. Here there was no attempt whatever on the part of the court to inform the defendant of his rights or to state the effect of the plea of guilty. The mere inquiry whether he understood that if he pleaded guilty the court would sentence him to the penitentiary, and his answering that he did so understand, was no explanation whatever on behalf of the court. The length of time which he might be sentenced to serve in the penitentiary and his right to a trial by jury if he entered the plea of not guilty were left entirely to his own knowledge and information, and explained by the court. * *

We are further of the opinion, in any view of the circumstances under which the plea was entered, that the court should, in the exercise of its discretion, have allowed the defendant to withdraw it. We do not base this conclusion altogether upon the affidavits, although we think the facts therein stated were sufficient to show that the defendant had pleaded guilty without fully understanding the consequences of that plea. His own statement that he did not understand its effect, in view of the fact that it was not fully explained to him, as the statute requires, should have moved the court to set aside the plea and allow him to submit his case to a jury on a plea of not guilty. The withdrawal of the plea of guilty should not be denied in any case when it is evident that the ends of justice will be subserved by permitting the plea of not guilty in its stead. 'The least surprise or influence causing him to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty.'"

In the present transcript it appears from the clerk's record of the proceedings of February 27, 1929, culminating in the entry of the judgment in question, that, after Vlahos had withdrawn his plea of not guilty and substituted therefor a plea

of guilty, he was "fully advised by the court of the effect in rendering said plea, and still persisted therein." Were there no bill of exceptions in the transcript showing the contrary, said clerk's record would be sufficient to sustain the judgment and sentence. (People v. Talbot, 230 Ill. 427, 431; People v. Harney, 274 Ill. 236, 238.) But there is in the transcript a bill of exceptions, certified by the trial judge, showing what was said and done on the day of the trial and also on the hearing of defendant's motions to withdraw said plea of guilty and to have said clerk's record amended so that it speak the truth. And what is said and done by the judge and what occurs in his presence, as recited and certified to by him, is to be accepted as true and correct. (People v. Stamatides, 297 Ill. 582, 590.) And this appellate court has decided that, on a writ of error to reverse a judgment on an indictment for larceny, the record as made by the clerk, showing a compliance with the statute (Sec. 4 of div. 13 of the Criminal Code above quoted), will not prevail as against what is shown in opposition to it in the bill of exceptions. (People v. Glick, 200 Ill. App. 46, 47; citing Indiana, etc., Ry. Co. v. Handrian, 190 Ill. 501, 508, and McChesney v. People, 174 Ill. 46, 50.) And the present bill of exceptions discloses that, on the day of the trial (February 27, 1929), after Vlahos' plea of not guilty had been withdrawn and his plea of guilty entered, the trial judge stated those facts and further stated: "The court has advised the defendant fully of the situation; he makes the plea because he is guilty." This statement in a measure negatives the fact that at this time the court "fully explained" to Vlahos the "consequences" of entering a plea of guilty. And the bill of exceptions further discloses that on the hearing of Vlahos' said motions on March 3,

1929, the court stated: "Let the record show that the court did not tell him anything about what the punishment would be." We think that these statements of trial judge, supplemented as they are by the testimony of the witness, Salariotis, and of Vlahos himself, show conclusively that when Vlahos' plea of guilty was received and recorded the provisions of the statute had not been complied with. And we also think, under the facts and circumstances shown, that the court abused its discretion in not granting Vlahos' said motions and in not vacating the judgment and sentence in question. (People v. Walker, 250 Ill. 427, 432; People v. Fulimon, 308 Ill. 236, 238; People v. Jayendowski, 326 Ill. 173, 178; People v. Murant, 331 Ill. 470, 481-2; People v. Hedrochmuck, 233 Ill. App. 211, 215.)

Other points are here urged by Vlahos' counsel for the reversal of the judgment in question, but we deem it unnecessary to consider them. For the reasons indicated the judgment is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

13545

LULU JACKSON,
Appellee,

v.

NATIONAL LIFE & ACCIDENT
INSURANCE COMPANY OF
TENNESSEE, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

On October 29, 1928, plaintiff, the named beneficiary in two policies of life insurance issued by defendant on the life of James Brown who died in the Cook County Hospital on June 23, 1928, commenced a 4th class action against defendant in the municipal court to recover the aggregate face amounts of the policies, \$645, together with interest. The policies are dated respectively February 20, 1928, and April 9, 1928. One is for \$125 and the other for \$520. The larger policy contains the provision that "no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health; should the proposed insured not be alive or not in sound health, any amount paid to the company as premium hereon shall be returned." The smaller policy contains a similar provision. The weekly premiums required to be paid are respectively, 35 cents and 40 cents. The cause came on for trial before the court without a jury in March, 1929. Defendant, having previously refused to pay the amounts of the policies to the beneficiary, defended on the ground that it was not liable because the insured was not in fact in sound health at the times the policies were issued. At the beginning of the trial plaintiff's attorney stated that "practically the only issue here is the health of the insured," and thereupon the parties stipulated that all weekly premiums prior to the insured's death had



FIGURE 1. Trends in the Y-axis. The Y-axis is labeled 'Y-axis' and the X-axis is labeled 'X-axis'.

The following are the results of the analysis of the data. The results are presented in the form of a table. The table is divided into two main sections. The first section is titled 'Trends in the Y-axis' and the second section is titled 'Trends in the X-axis'. The first section contains two tables. The first table is titled 'Trends in the Y-axis' and the second table is titled 'Trends in the X-axis'. The second section contains two tables. The first table is titled 'Trends in the Y-axis' and the second table is titled 'Trends in the X-axis'. The first table in the first section shows the results of the analysis of the data. The second table in the first section shows the results of the analysis of the data. The first table in the second section shows the results of the analysis of the data. The second table in the second section shows the results of the analysis of the data.

been paid and that due proofs of death had been furnished to defendant. Plaintiff introduced the policies in evidence and rested. Defendant called no witnesses three physicians and introduced certain documentary evidence. In rebuttal, plaintiff and three witnesses called by her testified. She made no attempt to show, and it was not shown, that defendant, when the policies were issued or thereafter and until said death, had any knowledge that the insured was not in sound health; nor did she urge on the trial that defendant had waived, or was in any way estopped to raise, its sole defense on the ground that it had not tendered back the paid premiums or on any other ground. At the conclusion of the trial the court found the issues against defendant and assessed plaintiff's damages at \$67.78. This sum is the aggregate face amounts of the two policies, plus certain interest allowed. On March 14, 1929, judgment on the finding was entered against defendant and this appeal followed.

After reviewing the evidence we think it clearly appears that the insured was not in sound health at the time the policies were issued, and we are of the opinion that the court's finding against defendant is unwarranted and that the judgment appealed from cannot stand. It is well settled that, where a policy of life insurance contains a provision, such as the one in the present policies, there can be no recovery thereon, unless at the date of issuance the insured was in fact in sound health. (Salaki v. Metropolitan Life Ins. Co., 196 Ill. App. 76, 79; Daniels Motor Sales Co. v. New York Life Ins. Co., 320 Ill. App. 83, 86; Gallant v. Metropolitan Life Ins. Co., 167 Mass. 79, 81; Murphy v. Egan, 108 Minn. 112, 113.) Defendant's evidence disclosed that the insured entered the Cook County Hospital in May, 1928, where he continuously received treatment until he died on June 23, 1928; that he was suffering from a vitamin deficiency disease known as "pellagra," and which is "of the same classification

as scurvy and beri-beri;" that the disease is a progressive one; that his symptoms were such as showed that he had the disease when the policies were issued and prior thereto and as far back as November, 1937; and that his death was caused by the disease. This evidence was not contradicted by plaintiff's evidence offered in rebuttal, which was merely to the effect that about the time the policies were issued the insured was working as a porter in a soft drink stand and was apparently in good health.

Plaintiff's counsel here contend in substance that, inasmuch as it does not appear that defendant ever tendered back the paid premiums to the insured or to the beneficiary, the finding and judgment are proper because it must be held that defendant either waived its said defense or it estopped to raise it. The contention, in our opinion, is lacking in merit. Furthermore, it is made in this court for the first time. A somewhat similar contention was unavailingly made in Leaback v. Metropolitan Life Ins. Co., 274 Ill. 516, 520 (affirming Mulaki v. Same, 196 Ill. App. 76, supra.) In discussing the contention our Supreme Court said (pp. 521-2):

"In In Re Killers' and Manufacturers' Ins. Co. supra. (see Parsons Rich & Co. v. Lang, 97 Minn. 98, being same case under a different title) it was held that when a policy of insurance never attaches and no risk is assumed, the insured may recover back the premiums unless he has been guilty of fraud or the contract is illegal and he is in pari delicto, but that the insurer is not obliged to return or offer to return the premiums which have been paid voluntarily before notice of the fact that the policy is not in force, as a condition precedent to availing itself of its defense to the action on the policy. The weight of authority and reason support the conclusion of the court in that decision. The insurance company may have a defense on the policy and against the payment of the premiums, too; and it is against reason to hold that an insurance company must pay premiums it may owe one party, however just, in order that it may defend a claim or a suit by another and different party, and where it has done nothing to waive its defense or to estop it to defend against such claim or suit." (See, also, Hermann v. Court of Honor, 193 Ill. App. 366, 369-70.)

For the reasons indicated the judgment of the municipal court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.
Barnes, P. J., and Scanlan, J., concur.

33545.

FINDING OF FACTS.

We find as facts in this case that when the two policies sued upon were issued, respectively on February 20, 1928, and April 9, 1928, the insured, James Brown, was not in fact in sound health; that the defendant company did not, prior to the insured's death on June 25, 1928, have any knowledge concerning said ill-health of said insured; and that it never waived any of the conditions and provisions of the policies sued upon.

1944

THE 1944-1945

It was in this year that the first of the
great changes came upon the world, and the
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33554

WILLIAM MILLER and
PETER BORMANN, for use of
MARGARET POLACHEK,
Plaintiffs in Error,

v.

BOWMANVILLE NATIONAL BANK,
a corporation, garnishee,
Defendant in Error.

254 PA. 311
ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 25, 1928, a judgment by confession for \$1184.15 was entered in the municipal court in favor of Margaret Polachek against William Miller and Peter Bormann on a judgment note. Subsequently garnishment proceedings were instituted against the Bowmanville National Bank and it was served with summons. On May 2, 1928, its default was taken for want of an appearance and a conditional judgment rendered against it as garnishee for \$1184.15. On May 8, 1928, after due service of a agere facias, it was again defaulted for want of an appearance and said conditional judgment was made final.

On June 30, 1928, more than 30 days after the rendition of said judgment of May 8, 1928, the garnishee appeared before the same judge who had entered the judgment and moved that said judgment be vacated and set aside and that said garnishee be given leave to file an answer. The motion was supported by its verified petition, in the nature of a bill in equity under the provisions of section 21 of the Municipal Court Act. Attached to and made part of the petition were certain affidavits. On the same day the court vacated and set aside said judgment; refused to allow plaintiffs to answer said petition; allowed said garnishee to file its answer claiming that it was not indebted in any sum to William Miller but that it was indebted to Peter Bormann on a checking account in the sum of \$61.10; and,

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upon the garnishee tendering said sum to plaintiffs and upon plaintiff's refusal of the tender paying said sum to the clerk of the court, discharged the garnishee. It is sought by this writ of error to reverse said order of June 30, 1928.

After reading the petition and the accompanying affidavits we are of the opinion that the same disclosed prima facie "grounds for vacating, setting aside or modifying" the judgment of May 3, 1928, and "which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity," but we think that the court erred in refusing to allow to plaintiffs time to answer the petition and not thereafter having a hearing. The filing of such a petition under the statute "is an independent proceeding, in the nature of a new suit, and not a mere incident to the original suit." (Imbris v. Bear, 230 Ill. App. 155, 158; Ixzi v. Lalongo, 248 Ill. App. 90, 93; Central Bond Co. v. Reeser, 323 Ill. 90, 94.

We hold that the court erred in refusing to allow plaintiffs to answer said petition, in setting aside the judgment of May 3, 1928, against the garnishee before such answer was filed and before a hearing on the merits, and in discharging the garnishee. And said order of June 30, 1928, setting aside said judgment of May 3, 1928, etc., is reversed, and the cause is remanded with directions to allow plaintiffs to answer the garnishee's petition and to thereafter have a hearing on the merits of said petition and answer.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Scanlan, J., concur.

33566

THE TEXAS COMPANY,
a corporation,
appellee,

v.

FRANK A. HART,
Appellant.

2541 A. 611
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in forcible detainer, commenced on March 13, 1929, and tried without a jury, the court found defendant guilty of unlawfully withholding from plaintiff the possession of the premises described in the complaint and that the right of possession was in the plaintiff. On April 2, 1929, judgment on the finding was entered against defendant and he appealed. On the day the judgment was entered plaintiff was given leave to file an amended complaint in which the premises are described as follows:

"Being the southeast corner of 79th Street and Woodlawn Avenue, known as 7901-03 Woodlawn Avenue, comprising lots 45 and 46 on Block 107, North east quarter, Section 35, Township 38, Range 14, East of the 3rd Principal Meridian, with a frontage of 55 feet on Woodlawn Avenue and 75 feet on 79th Street."

Upon the trial defendant, called by plaintiff as a witness under section 33 of the Municipal Court Act, identified his signature to a certain "License Agreement" (also signed by plaintiff, per E. E. Wright, as district manager.) He testified that he "did not go into possession under this agreement;" that "he had possession before it was entered into;" and that he is now in possession. He also testified that on March 2, 1929, he was served with a copy of a notice, addressed to him and signed by plaintiff, per said Wright. Thereupon plaintiff introduced in evidence the two papers.

1993

It was decided to transfer the building to the
City of New York, and after several years of delay,
the City of New York purchased the building in 1907.
The building was then used as a warehouse for the
City of New York, and it remained so until 1916,
when it was converted into a public library.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the American Friends Service Committee in the United States.

In the "License Agreement," partly printed and partly in typewriting and dated December 10, 1926, it is stated that it is between the Texaco Company of New York, as licensor, and Frank A. Hart, "doing business under the name of Avalon Filling Station" and residing in Chicago, as licensee. In paragraph 1, with the heading "Premises licensed," it is stated that the licensor "does hereby license and permit licensee to enter upon, use and occupy for the purposes and on the conditions set forth the following described property:" (Here follows description substantially the same as set forth in the amended complaint); together with the buildings, fixtures, equipment, etc., of the licensor now located thereon, including: "1 1000 gallon tank, 4 65 gallon Opaco Lub. Outfits, 2 Rayne Pumps, 1 Lub. Outfit;" and such buildings, tools, fixtures, etc. as the licensor may thereafter place thereon. In paragraph 2, with the heading "Term," it is stated that the license "shall continue for the term of seventy-six (76) months from and after November 1, 1926." In paragraph 3, with the heading "Rental," it is stated: "Licensee shall pay licensor, as compensation for this license, the sum of one dollar per annum, payable in advance, and other good and valuable considerations." In paragraph 4, with the heading "Use," it is stated that the licensee shall use the premises, buildings, equipment, etc. "for no purpose other than the storage, handling and sale of petroleum products." Other pertinent paragraphs are as follows:

"(5) Cancellation. Licensor hereby reserves the right at any time to cancel and terminate this license forthwith in event of the termination, or failure of consummation, of a certain sales contract now in force or being negotiated between the parties hereto, * *; or, in case the licensee ceases to store, handle or sell the products of the licensor; or in case the licensee does not conduct the business on the licensed premises with due diligence in the judgment of the licensor; or in the event of the expiration or termination of a certain sublease, dated December 10, 1926, by and between Frank A. Hart and licensor.

in the "Lancet" (London) "The Lancet" is a weekly medical journal published in London, England. It is one of the oldest and most influential medical journals in the world. The journal is published by the Lancet Publishing Group, which is a subsidiary of the British Medical Association (BMA). The journal is known for its high standards of quality and its commitment to providing the latest news and research in the field of medicine.

The journal is published in two parts, the first part is published on Wednesdays and the second part is published on Saturdays. The journal is known for its high standards of quality and its commitment to providing the latest news and research in the field of medicine. The journal is published by the Lancet Publishing Group, which is a subsidiary of the British Medical Association (BMA). The journal is known for its high standards of quality and its commitment to providing the latest news and research in the field of medicine.

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(c) Maintenance. Licensee shall maintain said premises in good repair, subject to the approval of licensor, during the term of this agreement, and in case of licensee's failure so to do, or in the event that from any cause the premises become in whole or in part unfit for occupancy or useless or unavailable for licensor's or licensee's purposes, this agreement may be terminated by licensor forthwith, and the unearned rental, if any, at the time of said termination shall be returned to licensee."

In another paragraph, provision is made for the entry of the licensor to make changes, repairs or substitutions in the buildings, fixtures, equipment, etc. In another it is provided that the licensee shall obtain all necessary permits to do business on the premises, as may be required by any ordinance or other government regulation. In another, that upon the expiration or termination of the agreement the licensee shall yield up to the licensor the premises, buildings, fixtures, equipment, etc., in as good condition as when received, ordinary wear and tear excepted. In a special paragraph, written in typewriting, the licensee is given the right of storing and selling automobile tires and accessories in that part of the station building reserved for that purpose, - the same not to interfere, however, with the business of selling the products of the licensor.

The notice served upon defendant on March 9, 1929, is to the effect that, because of defendant's "failure to sell" the products of the Texas Company, in compliance with the license agreement, at said premises (describing them), the Texas Company "hereby elects to terminate, and it does hereby terminate and cancel said license agreement, dated December 10, 1926," and defendant is "further notified that the Texas Company hereby demands of you the possession of the aforesaid premises." No other reason than that of defendant's "failure to sell" the products of the licensor is given for the licensor's election to terminate and cancel the agreement. It is not stated that defendant, as licensee, has not conducted the business on the premises "with due diligence in the

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of Alaska:

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in the present, as well as in the future, the Government of the United States is committed to the principle of self-determination for all peoples. It is the policy of the United States to support the right of all peoples to determine their own future, and to oppose any attempt to deny this right. The United States is committed to the principle of non-interference in the internal affairs of other countries, and to the principle of peaceful coexistence between all nations. The United States is committed to the principle of mutual respect for the sovereignty and territorial integrity of all states. The United States is committed to the principle of equality of rights and opportunities for all people, regardless of race, religion, or social class. The United States is committed to the principle of international law, and to the principle of the peaceful resolution of international disputes. The United States is committed to the principle of the free world, and to the principle of the free flow of trade and commerce. The United States is committed to the principle of the free press, and to the principle of the free expression of ideas. The United States is committed to the principle of the free movement of people, and to the principle of the free movement of goods and services. The United States is committed to the principle of the free world, and to the principle of the free flow of trade and commerce. The United States is committed to the principle of the free press, and to the principle of the free expression of ideas. The United States is committed to the principle of the free movement of people, and to the principle of the free movement of goods and services.

at least one of the following conditions:

THE UNIVERSITY OF CHICAGO PRESS

The center states

1000 "Aim. and purpose" is "to provide a means of communication between the people of the world and the people of the world."

Thereby, the Commission has been able to identify the following areas for improvement:

1. The first step is to identify the key components of the system. This includes understanding the hardware, software, and data involved. It also involves identifying the users and their roles within the system.

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1. The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1877. The letter is signed by Rutherford B. Hayes and is addressed to Charles Schreyer.

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judgment of the licensor."

Plaintiff also called as a witness John Lemming, chief clerk of the "land division of the district office," who, in addition to identifying the signature of said Wright to the license agreement, answered "Yes" to the leading question asked of him by plaintiff's attorney, as follows: "You can testify that that is the document under which Frank A. Hart was in possession of the premises?" This testimony is in a measure contradicted by paragraph 5 of the agreement, wherein it is stated that, in addition to said license agreement, Hart (defendant) has a "sub-lease" from plaintiff of even date. And it also appears from paragraph 5 that defendant has a "sales-contract" with plaintiff. Plaintiff made no attempt to introduce in evidence either the sub-lease or the sales contract.

Plaintiff also called as a witness Fred J. Wilhanek, who on direct examination testified that he was a "Zone Manager" of plaintiff in Chicago; that the premises were in "Zone 10;" that he had business dealings with all operators of the various service stations in said zone, including defendant's; that he called at the premises about noon on February 25, 1929, and found the station closed and "everything locked;" that upon a call made about a week ~~before~~ before he found that the station "was operating then;" that on March 1, 1929, he telephoned defendant and asked him why his station was closed on the preceding day, and that defendant replied that "he wasn't financially able to continue operation and that the station was closed;" that on February 26, 1929, plaintiff sold to defendant and delivered to said station 200 gallons of its gasoline; that for the period from March 1, 1929, to March 13, 1929 (the day the present action was commenced), plaintiff did not sell any gasoline to defendant; and that during said period defendant's station "was closed and not operating." On cross-examination the witness stated that he did not make any visits to defendant's

1. 1990-1991 20 (1990-1991)

DATE: 12/10/2001 10:00 AM TO: JAMES H. HARRIS

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14-00000

Approved: _____
Special Agent in Charge

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied.

to become a more self-conscious individual, aware of his or her

There is a certain sense in which the "nationalist" movement has been

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-19-2010 BY 60322 UCBAW

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

(The present action was commenced), Plaintiff has not only

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

station in March, 1929, and that he did not know of his own knowledge whether or not the station was closed from March 1st to March 15th, 1929. He made certain comparisons of the amounts of gasoline which plaintiff sold to defendant during February, 1929, February, 1928 and February, 1927.

Defendant was a witness in his own behalf and his daughter, Marion Hart, for him. He testified in substance that late in the evening of February 12, 1929, while on his way home, he was "black-jacked" (i.e., hit on the head with a blunt instrument), robbed of some currency and rendered temporarily unconscious; that after reaching home he received treatment by his wife and daughter; that he went to his filling station on February 13th and there worked for a part of the day, and also for a part of February 14th, when he "went under" and has had "dizzy spells" ever since - having fainted at times; that on February 14th he called a physician and has received many treatments since and is still receiving treatments; that for about three weeks after February 14th, because of his injuries and resulting illness he could not work at the station; that through the efforts of his wife he employed for about a week one Edward Stephens, a former employee, who did the work at the station usually done by the witness; that afterwards he employed one Leland Hilton who operated the station until early in March, 1929; that afterwards, and up to March 13th, the witness' son, a boy 15 years of age, operated the station; that during all these periods plaintiff's gasoline was sold to customers at the station; that between March 1st and 13th approximately 150 to 200 gallons were there sold to customers; that between March 3rd and 13th he several times telephoned plaintiff to deliver more gasoline and it refused to do so; that early in March, about a week before he received the notice of March 9th, and while he was confined to his home, he received a call from Mr. Allen, "district supervisor" of plaintiff, who in-

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

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quired what he (the witness) intended to do about the operation of the station; that he replied that he intended to continue its operation, although stating that he then was "in bad shape, physically and financially;" that Allen said that he "wanted to rent the station to his brother," and offered him \$100 for the station, which offer he (the witness) refused; that he requested of Allen that plaintiff temporarily put in a man to operate the station, while he (the witness) was recuperating, but that Allen refused to do so, saying "we have got no one to run the stations;" that, as to his present physical condition, his physician has advised him to keep as quiet as possible and avoid excitement, as there is "a nerve pressure there some place due to concussion, shock or fall;" and that he requested said physician to be present in court "this morning" but that the latter said he could not as "he had an operation on." Defendant's testimony as to his injuries and present condition was corroborated by that of his daughter, Marion Hart. She further testified that on February 14th the station was opened by said Stephens and was thereafter "kept open." There was no contradiction of this testimony. Allen was not called as a witness.

After a review of the present transcript we are of the ^{the} opinion that judgment appealed from cannot stand. It is based upon said license agreement of December 10, 1926 (particularly a provision in paragraph 5 thereof) and plaintiff's notice of March 9, 1929, of its election to cancel the agreement and forfeit it, upon the stated ground of defendant's "failure to sell" the products of plaintiff. The particular provision mentioned is plaintiff's reserved right at any time to cancel and terminate said license "in case the licensee ceases to store, handle or sell the products of the licensor." On the issue of fact whether, prior to March 9, 1929, or prior to March 13, 1929, defendant had ceased or failed

to sell the products of plaintiff, we think that the evidence discloses no such cessation or failure, and that the finding and judgment on that issue are against the weight of the evidence. Furthermore, it is well settled in this State that courts of law and equity do not favor forfeitures. (Trader's Corporation v. Chirk, 237 Ill. App. 1, 11; Harley v. Sanitary District, 107 Ill. App. 546, 357; Palmer v. Ford, 90 Ill. 369, 377.) And it does not appear that plaintiff, before the attempted forfeiture of the license agreement, returned or tendered to defendant the unearned portion of the annual rental. And, even if it could be held that plaintiff was entitled to a forfeiture of the license agreement, it would not follow that plaintiff would be entitled to recover from defendant the possession of the premises in question, because it appears from the face of the agreement that defendant, in addition to said license, has a sub-lease of the premises from plaintiff (also executed on December 10, 1926), and there is no evidence in the record concerning the terms and conditions of said sub-lease, or that plaintiff has forfeited it, or that plaintiff is entitled to possession of the premises under its terms. And the fact that plaintiff did not see fit to introduce the lease or any evidence concerning it raises a strong presumption against plaintiff's right to the possession of the premises, as claimed in its forcible detainer complaint of March 13, 1929, as amended. (See Kaplan v. Stein, 329 Ill. 253, 264; Mantonys v. Reilly, 184 id. 183, 205.) While it may possibly be true, as argued by plaintiff's counsel, that defendant, during his illness following the injuries received on February 13th, and up to March 9th, 1929, did not conduct the business on the licensed premises "with due diligence in the judgment of the licensor," this claimed lack of diligence was not made the ground for plaintiff's attempted forfeiture of the license agreement. The only ground of forfeiture, as stated in plaintiff's notice of March 9, 1929, was defendant's "failure to

sell" the products of plaintiff, and plaintiff must be limited to that ground. In 13 Corpus Juris, sec. 632, p. 807, it is said: "Where a party has attempted to terminate a contract on a stated ground, such action cannot afterward be justified on the ground that other sufficient reasons therefor existed at the time." and in Wright v. Graves Land Co., 10 Wis. 269, 274, it is said: "A party who proposes to insist upon a technical forfeiture of a contract upon certain grounds specified is usually held to the case he has made; if he assumes to claim a forfeiture upon grounds specifically stated, he is deemed to have waived other breaches."

For the reasons stated the judgment of the municipal court, awarding possession of the premises to plaintiff, is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Scanlan, J., concur.

33586.

FINDING OF FACTS.

We find as facts in this case that neither prior to March 9, 1929, nor prior to March 13, 1929, did defendant, Frank A. Hart, cease or fail to sell the products of plaintiff, the Texas Company, and that said defendant was not on March 13, 1929, or prior thereto, unlawfully withholding the possession of the premises in question from plaintiff.

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33642

EDITH JOHNSON,
Plaintiff in Error.

v.

JAMES BARNETT JOHNSON,
Defendant in Error.

25 JAN 11
BRANCH TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, who was complainant in the superior court, seeks to reverse a final decree, entered on February 7, 1929, after the hearing of evidence upon the merits, wherein the court found the equities with defendant and dismissed complainant's bill at her costs. Counsel for complainant here contend that the court erred in overruling complainant's motion to dismiss her bill without prejudice, which motion, as he says, "was made prior to the entry of the final order or decree in the cause." No brief has here been filed by defendant.

There is no certificate of evidence contained in the present record. From the clerk's transcript, as certified by him, it appears that on March 24, 1927, complainant filed her bill praying for a divorce from defendant on the ground of extreme and repeated cruelty, for alimony and solicitor's fees, and for the custody of the six year old son of the parties, Allen Barrett Johnson; that on April 4, 1927, defendant filed his answer in which he denied all acts of cruelty as charged and denied that complainant was entitled to the relief as prayed; that thereafter and from time to time various orders and rules to show cause, etc., were entered by the court concerning the payment by defendant of temporary alimony and solicitor's fees; that on December 27, 1928, defendant, by leave of court, filed

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a so-called "special plea" in which he denied all acts of cruelty as alleged and stated that "said acts, if they occurred, were specifically condoned by complainant;" that on February 6, 1929, complainant, by her solicitors, filed in the clerk's office a written motion, and notice thereof to defendant's solicitor, to dismiss her bill of complaint at her costs "without prejudice;" and that on February 7, 1929, the final decree in question was entered.

It further appears from the clerk's transcript that on March 3, 1929, complainant by her solicitors filed in the clerk's office a written motion asking that said clerk be directed "to amend the docket to show the presentation of her motion heretofore made to dismiss the bill of complaint herein at complainant's costs without prejudice and the denial or overruling of said motion previous to the entry of the decree herein;" that said motion was ordered continued until March 29, 1929; and that on that day the court entered a draft order denying said motion.

Counsel for complainant state in their brief that on February 5, 1929, a trial of the issues of the cause was had before the chancellor; that at the close of all the evidence the chancellor indicated that he would enter a finding and decree in favor of defendant, but that no final decree was signed on that day; that on the following day (February 6th) complainant filed with the clerk of the court her written motion to dismiss her bill without prejudice, and also served notice on defendant's solicitor that on February 7th she would appear before the chancellor and ask that the motion be granted; that on February 7th both parties and their respective solicitors appeared; that the court denied the motion and thereafter entered the final decree in question. Counsel contend that the court in so doing erred, because complainant had the absolute right, no cross-bill having been filed, to dismiss her bill at any time

before the actual signing and entry of a final decree, and even after the chancellor following a trial upon the merits of the bill had announced his findings and had indicated that he would enter a final decree in favor of defendant. And counsel, in support of their contention, cite the cases, among others, of Purdy v. Henslee, 97 Ill. 339, 398; Reilly v. Reilly, 139 id. 133, 134; Williams v. Breitung, 316 id. 299, 307; Whitaker v. Irons, 300 id. 254, 256.)

But, as previously mentioned, there is no certificate of evidence contained in the present record, and in the absence of such a certificate we cannot assume that the statements made by complainant's counsel as to what occurred before the judge on February 7, 1929, are correct. For aught that appears to the contrary in the present record complainant's motion to dismiss her bill without prejudice may not have been presented in court to the judge on February 7, 1929, or if then presented, the presentation may not have been made until after the final decree in question had been signed by the judge and entered of record.

The decree is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

33666

SKY PROJECTOR CORPORATION,
a corporation,
Complainant and Appellee,

v.

ANROGRAPH COMPANY OF AMERICA,
a corporation, GREGOR MELIKOV,
ALFRED E. FRIEDER, EDWARD FRIEDER,
OSCAR FRIEDER, IRVING E. FRIEDER,
and GENERAL ELECTRIC COMPANY,
a corporation,
Defendants.

INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

GREGOR MELIKOV, ALFRED E. FRIEDER,
EDWARD FRIEDER and OSCAR FRIEDER,
Appellants.

MR. JUSTICE GRIBNEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by four defendants from an order of the superior court, entered April 25, 1929, wherein the court, following the findings and recommendation of a master in chancery, denied defendants' motion to dissolve a temporary injunction issued against them on June 11, 1927.

Complainant's verified bill was filed on June 10, 1927, and the injunction was issued without notice. On June 17, 1927, defendant Melikov filed a separate verified answer to the bill and the Frieders a joint and several answer. On the same day Melikov presented his written motion to dissolve the injunction (in which the Frieders in open court joined) stating, among other grounds, (1) that there is no equity on the face of the bill; (2) that the court is without any jurisdiction over the subject matter set forth in the bill to issue any injunction; and (3) that the court is without jurisdiction to issue any injunction "before the patent applied for, as set forth in the bill, is issued." The

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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court ordered that the hearing of the motion to dissolve be referred to a master to hear evidence in support of the bill and of the answers, "in so far as the same shall effect said motion to dissolve the injunction," and to report back his findings and conclusions of law and fact as soon as possible. The hearing before the master was commenced on June 21, 1927, and from time to time thereafter a mass of evidence, oral and documentary, was introduced by the respective parties. Subsequently the master filed a lengthy report, making many findings, concluding that the court "has jurisdiction of the parties and of the subject matter," and recommending that the temporary injunction be continued in force. Objections to the report were ordered to stand as exceptions, and on April 25, 1928, the order appealed from was entered. In that order, it appearing that Irene M. Frieder had died on November 12, 1927, the court ordered that the injunction be modified to the extent only of omitting therefrom her name; that all exceptions to the master's report be overruled; that the motion of defendants, Melikov and the Frieders, to dissolve the injunction be denied; and that the injunction, except as modified by the omission therefrom of the name of said Irene M. Frieder, now deceased, "continue in force until the further order of this court."

The temporary injunction in question enjoined the Aerograph Company of America, a corporation, Greger Melikov, and the Frieders, their employees, servants and agents,

"from projecting or attempting to project words, letters, symbols, pictures or images in or upon the sky or clouds by the use of said Aerograph; and from making or attempting to make said threatened exhibitions and demonstrations of the so-called aerograph in the week commencing June 17, 1927, in or near New York City, and in the week commencing June 26, 1927, in or near Minneapolis, Minnesota; and from making or attempting to make any exhibitions or demonstrations, public or private, to or before any person or persons at any time or place of said so-called Aerograph, or of any apparatus or device constructed by or for the said defendants for the

purpose of projecting in or on the sky or clouds any letters, words, symbols, pictures or images; and from making, using or transporting any such device or apparatus or plane, drawings, photographs or pictures thereof; and that the said defendants, their agents, servants, employees, all and each of them, be further enjoined from holding forth by letters, telegrams or any form of advertising that they or any of them are the inventors or owners of the said Aerograph, a sky projector, or the complainant's said invention in any form, or under any name whatsoever; and from asserting or claiming to have any right, title or interest in any form in or to said invention or any machine based in whole or in part upon said invention; and from selling, leasing, licensing, giving or lending to any person or persons whatsoever the said Aerograph, or any apparatus or device involving complainant's said invention, or right to use the same, or any information in any manner or form with respect thereto, and from advertising in any form, soliciting or obtaining contracts for use of, said Aerograph or any device or apparatus embodying any features of complainant's said invention in any form or under any name whatsoever; all until further order of this Court."

The master's findings as contained in his report are substantially as follows:

1. That complainant is a New York corporation, with principal office in New York City, and is engaged in the business of manufacturing, operating and leasing to advertisers in the United States the so-called Sky-Projector, which is a mechanical device for projecting in the sky written and printed words, or images, for advertising purposes.

2. That H. Grindell Matthews, while connected with the Board of Invention and Research of the British Government in 1915, was engaged in devising means to ward off German Zeppelins coming to England; and that while so engaged he constructed a contrivance for the purpose of interfering with the vision of the Zeppelins' pilots, which contrivance consisted of a lens of a focal length of approximately 15 feet, with a 12 inch opening and placed in front of a powerful searchlight.

3. That in January, 1926, Matthews, continuing with his experiments, went to Wetzlar, Germany, and there caused to be constructed a sky projecting machine which consisted of a lens of a focal length of approximately 15 feet, with a 17-1/2 inch opening, a searchlight and a stencil containing the letters "E.L.;" that when the stencil was placed in front of and at a certain distance from the searchlight the letters appeared sharply defined in the sky; that another machine was there constructed about the same time; that both had a lens of 17-1/2 inch opening and a focal length of approximately 15 feet; and that afterwards one machine was shipped to London and the other to New York City.

4. That in March, 1926, Matthews applied for a patent, covering what he claimed to be his invention, in the government patent office of Great Britain, also made applications for patents in Germany, France and Canada, and in August, 1926, applied for a patent in the patent office of the United States; that thereafter patents were granted to him (though not yet issued) by the governments of Great Britain and Canada; that

his application for a United States patent is still pending and undetermined; that prior to said application the essential features of his claimed invention were kept secret from the public, and no disclosure thereof was made to persons other than those necessarily associated with him; that his said invention, as claimed, consists "of a lens of a focal length of 15 feet, a powerful searchlight and a stencil, placed 15 feet away from the lens;" and that the device is of great value for commercial advertising purposes, in that it can project letters, words, pictures and images upon the sky at night.

5. That Matthews made arrangements with the Sperry Gyroscope Co. of New York to construct machines embodying his invention; that he assigned to complainant corporation all his right, title and interest in and to said invention, and the right to use the same, in the United States, and such title, interest and right was at the time of the filing of the present bill, and now is, solely owned by complainant; and that the machines built by Matthews in Germany and those built by said Sperry Gyroscope Co. "are substantially the same."

(6) That Jesse H. Whiteley is the vice-president and general manager of complainant, and holds like official positions with Cecil, Barrett and Cecil, an advertising agency with principal offices also in New York City; that in December, 1926, Whiteley had a confidential interview in Chicago with Philip K. Wrigley, president of William Wrigley Co. of Chicago, in reference to the latter's use of complainant's sky projecting device for advertising purposes; and that shortly thereafter Wrigley went to New York City and had a second interview with Whiteley, seeking further information as to the device, etc.

(7) That defendant Melikov first became interested in the possibility of projecting letters, etc. upon the sky in 1918, in Berlin, Germany, and afterwards made experiments in Chicago with small stereopticon machines; that on January 21, 1927, the Chicago Tribune published an article to the effect that a sky writing machine had been invented in Germany; and that Melikov read the article and brought it to the attention of some of his friends who had witnessed some of his demonstrations with said stereopticon machines at his Chicago residence.

(8) That about February 9, 1927, Melikov called on said Wrigley in Chicago and told him he had a machine for projecting advertising upon the sky; that Wrigley said he had recently made a trip to New York regarding a similar machine and he gave Whiteley's address to Melikov; that on March 15, 1927, Melikov called on Whiteley at the latter's New York office, and told him that "he was an engineer and had been sent by said Wrigley to investigate what was being done with the sky projector machine, and that he wanted to report back to Wrigley;" that Melikov was then introduced "as Wrigley's engineer and technical adviser" to Matthews, and afterwards, at the plant of the Sperry Gyroscope Co. was introduced "as Wrigley's engineer and representative" to Frank H. House and Preston K. Bassett, both engineers in the employ of said Gyroscope Co.; and that Melikov had several interviews with all of these parties and was "shown the plans," which were then being used in the construction of a machine by the Gyroscope Co. for complainant, and also was given "all the information as to the size of the lens and searchlight, and the various positions of the searchlight, lens and stencil, as used in the machine."

(9) That on the same day (March 15th) Whiteley, at Melikov's request, wrote a letter addressed to Melikov, 901

1. The first part of the report deals with the general situation of the country and the progress of the work of the Commission. It is a summary of the work done during the year and is intended to give a general impression of the work of the Commission.

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1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its program. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its program. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its program. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its program.

Argyle Street, Chicago, in which Whiteley stated that "we hope to be able to show you a demonstration of the Sky Projector in two weeks," and will advise you of the exact day; that, as to complainant's method of leasing machines, "we will agree to lease to any manufacturer a machine with an operator, either to be kept permanently in one city, or mounted on a truck so that it can be moved freely," and we will bear all expense of operation, stencils, etc.; that "our terms, will be approximately \$100,000 for 12 months for a standing machine, and \$120,000 for 12 months for a movable machine;" that machines can be rented for 6 months at a higher proportionate rate; that upon a successful demonstration of the machine, "now being built for us" by the Gyroscope Co., "we will immediately place the machine on the market to be leased;" and that we understand that Mr. Wrigley, as well as many others, are greatly interested in the machine, and we are willing to give a demonstration to any who may attend, and believe we can supply the necessary number of machines for any advertiser in fairly short order. Three days later (March 18th) and again on April 16, 1927, Whiteley wrote to Wrigley at Chicago. In the first of these letters Whiteley writes that he had a pleasant visit from Melikov, during which "we showed Melikov the entire layout;" that he said "he would notify you that we had a good proposition;" that the machine will be demonstrated about April 4th, and we would be pleased to have you or one of your representatives in attendance, etc.

(10) That on April 21, 1927, Wrigley wrote Whiteley saying that on his return to Chicago from a western trip he had found Whiteley's letters awaiting him; that "in your letter of March 18th you mention a Mr. Melikov;" that "my recollection is he is the gentleman who came into my office and stated he had a similar kind of a contrivance for advertising in or on the sky;" that the writer told Melikov that he had already had a similar proposition made from your concern, and, upon his request, the writer gave him your name and address; and that "we are giving you this information, so that you will understand that Mr. Melikov is not in any way representing the Wrigley Company, but apparently is an inventor himself and was anxious to see what your proposition was."

(11) That counsel for defendants contended before the master that, when Melikov called on Whiteley on March 18th, he stated to Whiteley that "he was an inventor and interested in complainant's sky projecting machine," and that the information he then received as to such machine was given to him voluntarily by Whiteley, Matthews and the others; that the writer finds, however, from a preponderance of the evidence, that Melikov did represent himself as Wrigley's engineer and representative, and that the information regarding said machine and invention when imparted to him was given "by reason of said misrepresentations and fraud practiced upon complainant;" and that all of Melikov's said statements made to Whiteley, Matthews, House and Bassett were "wholly false and known by Melikov to be false, and were made by him with the intent and purpose of deceiving complainant into permitting him to obtain confidential detailed information regarding said sky projector, and thereby enable him to appropriate to his own use complainant's invention."

1. The first of these is the fact that the Government has been unable to secure the necessary funds to carry out its policy. This is due to the fact that the Government has been unable to secure the necessary funds to carry out its policy. This is due to the fact that the Government has been unable to secure the necessary funds to carry out its policy. This is due to the fact that the Government has been unable to secure the necessary funds to carry out its policy.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator must first determine the nature of the problem and the scope of the investigation. This is done by reviewing the available information and by conducting interviews with the relevant parties. The investigator must also determine the objectives of the investigation and the methods to be used to achieve these objectives.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a genuine organization or a front organization for the Soviet Union.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who have been afflicted by a severe drought and famine. The President expresses his sympathy for the suffering people and offers them the aid of the Federal Government. He also mentions the fact that the Congress has passed a law to provide relief for the people of California.

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-alignment. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-alignment.

(12) That on March 17, 1927, Melikov went to the office of the General Electric Co., at Schenectady, New York, for the purpose of ordering a sky projecting machine; that said Electric Co. did thereafter construct for him such a machine "from plans arranged therefor by said Melikov;" that the machine, as so constructed by the Electric Co., "consists of a high intensity searchlight, a plate or stencil, and a lens, focal length lens of the same size as the lens used in complainant's machine;" that "the spacing between the searchlight, plate or stencil, and said lens, used in the machine constructed by said Electric Co. for Melikov, are substantially the same as the spacing specified in complainant's specifications and plans; and that the only change from complainant's machine is the enclosure of the searchlight, stencil or lens in a tube or barrel."

(13) That Melikov, and certain of the other defendants associated with him and operating as the Aerograph Company of America, informed various advertisers that on May 2, 1927, in the City of Washington, D.C., they would exhibit said machine as so constructed by said Electric Co., and that on said day it was in said city.

(14) That on March 3, 1927, Melikov filed an application in the U. S. Patent Office for letters patent for invention in "sky writing devices;" that no further explanation of said invention appears in the evidence; and that on May 19, 1927, complainant was advised by the U. S. Patent Office "that an interference was filed in said office against the issuance of a patent covering said sky-projector machine upon said patent application of said Matthews."

(15) That counsel for defendants contended before the master that the controversy between the parties "involves patent applications pending in the U. S. Patent Office, and that, therefore, this court is without jurisdiction;" but that the master finds "that the invention claimed by complainant is the result of experiments conducted by Matthews, as hereinbefore set forth, and constitutes a valuable property right, irrespective of the question of the pending patent application, and that the construction of the machine in question was a secret, which Melikov obtained from complainant by means of wrongful misrepresentations, as hereinbefore set forth, and appropriated the information so obtained by him to his own use and advantage."

Arguing that in all cases brought to restrain infringement of patents the Federal Courts of this country have exclusive jurisdiction (and citing among numerous other cases that of Havane Press Drill Co. v. Ashurst, 148 Ill. 115, 137), defendants' counsel first contend that the superior court of Cook county was without jurisdiction to enter the temporary injunction order of June 11, 1927. In our opinion there is no merit in the contention. Complainant's bill does not seek to restrain the infringement of a patent. Indeed, it does not appear that any patent on the device or machine in question has as yet been issued to anyone. The theory of complainant's

is in substance that it, as assignee of Matthews, is the owner of a new and useful improvement in Sky Projectors invented by Matthews, which is property; that by misrepresentation and fraud Melikov procured information as to the essential features of Matthews' invention; that Melikov and his co-defendants, in causing machines which embody these essential features to be manufactured and exhibited for sale, have fraudulently appropriated to their own use Matthews' invention; and that complainant is entitled to an injunction to protect its property right and prevent other threatened unlawful acts by defendants. In 30 ruling Case Law p. 1163, sec. 45, it is said:

"But although one who invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, has not an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it, yet he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority." (See Peabody v. Norfolk, 98 Mass. 452, 458.)

In Joliet Mfg. Co. v. Dice, 106 Ill. 649, 661, our Supreme Court recognized that an invention prior to the issuance of a patent therefor is property. In Rees v. Peltzer, 75 Ill. 475, 478, it is said: "Among the instances of property acquired by one's own act and power of original acquisition, given by elementary writers and courts, is that of literary property, consisting of maps, charts, writings and books; and of mechanical inventions, consisting of useful machines or discoveries, produced by the joint result of intellectual and manual labor." In Berlato Coal Co. v. Hantenbush, 237 Ill. App. 550, where the bill prayed for an injunction, one of the appellate courts of this district recognized that a property right existed in a certain list of agents, which had been compiled by years of work and at considerable expense, and should be protected by injunction against one who had fraudulently

appropriated the list to his own use, saying (p. 359): "We are not here concerned with the rights of either side as against the people, but with the rights of each as against the other. " " as between the parties, the list of names must be considered, therefore, as property." (See, also, Itone v. Grasselli Chemical Co., 65 N. J. Eq. 756, 761-2; Westervelt v. National Paper Co., 134 Ind. 573, 577-8; Pressed Steel Car Co. v. Standard Steel Car Co., 210 Pa. St. 464, 473-9; Kendall v. Linger, 21 How. (U. S.) 323, 329.) In Ingle v. Landis Tool Co., 462 Fed. Rep. 150, 154, it is said: "There is no provision of law that prevents the assignment of the invention not patented. Such is regarded as other property. The law only takes it out of the ordinary when a patent therefor is granted. Then it is that the statute, section 4898, R. S. U. S. (Comp. St. Sec. 9444) applies, and requires that the assignment, conveyance or grant, or whatever interest therein, shall be in writing." and the fact that Matthews (complainant's assignor) has an application pending for a patent on his said invention, does not prevent complainant obtaining a temporary injunction against defendants, restraining them from using property fraudulently appropriated. (Gillman v. Thompson, 57 Ind. App. 136, 133-3.) And when Matthews filed his application for a patent on his invention he did not then disclose said invention to the public, for said application until a patent be issued is treated by the Patent Office as a confidential disclosure.

And, after reviewing the voluminous evidence in the present case, we think that the master's findings, confirmed by the court, are amply sustained by the evidence, and that the court did not err in denying defendants' motion to dissolve the temporary injunction.

And we think that the allegations of the bill, supported as they are by the evidence introduced before the master, disclose a clear right in complainant to the temporary injunctive relief as prayed. And we do not think, as defendants' counsel further contend, that the evidence shows any such conduct on the part of complainant, or its

officials, so should bar it from the temporary injunctive relief as prayed for and as granted by the court.

Our conclusion is that the order of April 25, 1929, wherein the court, following the master's recommendations, denied defendants' motion to dissolve the temporary injunction in question, as modified, should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

11914

JOHN ROCK,
Appellee.

v.

MINNEAPOLIS, ST. PAUL &
SAULT STE. MARIE RAILWAY
COMPANY,

Appellant.

APPEAL FROM CIRCUIT COURT,

COCK COUNTY.

MR. JUSTICE SCABLAN DELIVERED THE OPINION OF THE COURT.

This case was before us in Rock v. Minneapolis, St. P. & S. Ste. M. Ry. Co. (247 Ill. App. 600), wherein we affirmed a judgment for \$15,000 obtained by Rock against the Railway Company in the Circuit Court of Cook County. A petition for certiorari was denied by our Supreme Court. The plaintiff sued under the Federal Employers' Liability Act and the Supreme Court of the United States allowed a certiorari and later entered a judgment (Minneapolis, St. P. & S. M. Ry. Co. v. Rock, 49 Supreme Court Reporter 363) reversing the judgment of this court and remanding the cause to this court for further proceedings not inconsistent with the opinion of that court. In our former opinion we fully stated the material facts and the questions then involved on the appeal to this court. It is only necessary in this opinion to refer to the sole question now involved, and we can best state the same by quoting from our former opinion (p. 604):

"The proof shows that the plaintiff, under his real name, applied to the defendant for work as a switchman October 1, 1923. His application was rejected because he had been operated on for a rupture, appendicitis and abscesses of the stomach. Then, under the name of John Rock - that being the name of a brother - he made a second application October 13, 1923. This application was not in the handwriting of the plaintiff and when the time came for him to be physically examined he did not take the examination himself but sent a man named Lenhart, who pretended to be the plaintiff and underwent the physical examination. Thereafter, and until the accident,

the plaintiff was employed by the defendant company - a period of about 14 months. The defendant contends that 'the fraud perpetrated upon the defendant by the plaintiff in his attempt to secure employment deprived him of the right to claim the benefits accruing to "employees" under the provisions of the Federal Employers' Liability Act.' The defendant concedes, in the oral argument, that the physical condition of the plaintiff at the time of the accident did not contribute in any way to his injury."

As to this contention we hold (p. 608):

"After a careful consideration of the question, we have reached ^{the} conclusion that at the time the plaintiff sustained the injury in question the relation of master and servant existed between him and the defendant, and the contention of the defendant is, therefore, not sustained."

The Supreme Court of the United States held (opinion by Mr. Justice Butler) that while the physical condition of the plaintiff was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment, and that because of the means by which he got employment and retained his position he was guilty of a continuing wrong in the nature of a cheat and his status was at all times wrongful and a fraud upon the defendant and that therefore he had no right to recover in an action under the Federal Employers' Liability Act. This ruling is binding upon this court in the present case, and, as the facts with reference to the sole question determined by the Supreme Court of the United States are conceded, it is our duty, under the mandate of that court, to hold that the plaintiff did not and cannot make out a prima facie case against the defendant under the Federal Employers' Liability Act, and to reverse, without remanding, the judgment of the Circuit Court of Cook County. The judgment of the Circuit Court of Cook County is therefore reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

33250

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GREENEBAUM SONS BANK AND TRUST COMPANY
in its capacity as trustee under a Trust
Deed from Roy A. Dallager and Catherine
S. Dallager to it dated September 14,
1923, and recorded in the Recorder's
Office of Cook County, Illinois, as
Document No. 3107234 and Greenebaum Sons
Investment Company,
(Complainants) Appellees.

v.

MICHIGAN BUILDING CORPORATION,
a corporation, et al.,
Defendants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Appeal of OSSIAN CAMERON, Defendant,
Appellant.

Formerly Entitled:

GREENEBAUM SONS BANK AND TRUST COMPANY
in its capacity as Trustee under a Trust
Deed from Roy A. Dallager and Catherine S.
DALLAGER to it dated September 14, 1923,
and recorded in the Recorder's Office of
Cook County, Illinois, as Document No.
3107234 and Greenebaum Sons Investment
Company,

Complainants.

v.

ROY A. DALLAGER et al.,
Defendants.

Appeal of OSSIAN CAMERON, Defendant,
Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Ossian Cameron, defendant, appeals from a decree of
the Circuit Court of Cook County entered in the above cause.

Greenebaum Sons Bank and Trust Company, as trustee,
and Greenebaum Sons Investment Company filed their bill of
complaint for the partial foreclosure of the lien of a trust

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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• *Journal of Management Education* 34(1): 10-12

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THE JAMES EARL RAY CASE: A SUMMARY OF THE EVIDENCE

There is a lot of talk about the importance of leadership in the workplace.

deed as to certain bonds and interest coupons. The bill made (inter alia) Roy E. Hallager and Catherine E. Hallager, Michigan Building Corporation, the trustee under the second and third trust deeds, and the beneficiaries under both of said trust deeds, parties defendant. The bill described all the bonds secured by the trust deed upon which foreclosure was brought, set forth the main provisions of the trust deed, and alleged the default in the payment of certain bonds and interest coupons due September 15, 1926, the purchase of said bonds by Greenbaum Sons Investment Company, its failure to notify Greenbaum Sons Bank and Trust Company, as trustee, of its intention to enforce said bonds and interest coupons on a parity with the "outstanding bonds and coupons" secured by said trust deed, and alleged that the effect thereof under the terms and provisions of said trust deed was to subordinate the lien of said bonds and interest coupons so held by Greenbaum Sons Investment Company to the lien of all the "outstanding bonds and interest coupons" described in and secured by the trust deed; alleged that the bonds (460 in number) secured by said trust deed were dated September 14, 1923, and amounted to \$275,000 par value, and were due serially in various amounts every six months commencing March 15, 1926, and ending September 15, 1933; that the trust deed conveyed the real estate described therein, and the rents, issues and profits thereof, and provided that immediately upon the filing of a bill to foreclose, or at any time thereafter, the court might appoint a receiver, etc.; that it would become necessary, pending the disposition of said foreclosure proceedings, for complainants to make further payments and disbursements in the purchase and payment of bonds and interest coupons secured by said trust deed and that would become due after the filing of said bill, and also to make payment of fire insurance premiums for insurance on said premises, etc. The bill

further alleged that a second trust deed was placed on the premises by the Ballagers and a third trust deed by the Michigan Building Corporation, the then owner of the premises. Roy A. Ballager and Catherine M. Ballager filed their answer to the bill, in which they set up (inter alia) that they had transferred the property in question to the Michigan Building Corporation, a corporation, by warranty deed, and that said corporation had assumed the payment of the bonds and interest coupons secured by the trust deed sought to be foreclosed herein, and thereupon, on motion of complainants, the bill was dismissed as to the Ballagers. The appellant, Gavin Cameron, filed an answer admitting the execution of said second trust deed and averring that he owned \$1,500 par value of bonds secured thereby, and denying that complainants were entitled to the relief prayed. The court, on motion of complainants, appointed a receiver of the premises and the cause was heard by a master in chancery, to whose report appellant and Kate E. Hall, alone, filed objections and exceptions, all of which were overruled and a decree was entered in conformity with the master's report. Kate E. Hall has not appealed. The decree finds that there was due to Greenebaum Sons Investment Company:

"1. The amount due on bonds and coupons held by it at the time of the filing of the bill of complaint herein, and that at that time the lien of such bonds and interest coupons had been and was subordinated to the lien of the other outstanding bonds and coupons secured by said trust deed.

2. The amount paid out by Greenebaum Sons Investment Company after the filing of the bill of complaint herein for bonds and interest coupons taken up by them, the lien of which, under said trust deed, was superior to the lien of the bonds owned by Greenebaum Sons Investment Company, when the bill of complaint was filed herein.

3. The amount paid for normal income tax, for redemption from tax sales and payment of taxes to purchasers at such tax sales, and for subsequent taxes paid by it.

4. The amount paid for premiums for fire insurance policies, and for plate glass insurance.

5. The amount fixed and allowed for solicitors' fees."

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It is not known whether the above information was obtained from the same source as the information in the above paragraph. The information in the above paragraph was obtained from a source who has provided reliable information in the past.

12. The above information is being furnished to you for your information and use only. It is not to be distributed outside your agency without the express written approval of the Bureau of the Census. The information is being furnished to you for your information and use only. It is not to be distributed outside your agency without the express written approval of the Bureau of the Census.

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

It also found the amount due on the second mortgage and delinquents' fees thereunder, and that the lien of the trust deed securing the same was subject to the lien of the trust deed sought to be foreclosed herein, and it directed a sale of the property to pay the amounts found due.

The appellant contends that "complainants, when they dismissed their bill of complaint as to the mortgagors, the two Dallagers, lost all right to a decree of foreclosure, because such defendants were necessary parties to the proceeding." We find no merit in this contention. While it is true that at the time of the entry of the decree herein the Dallagers, who were mortgagors, were not then parties defendant to the suit, they were parties defendant to the original bill and they filed their answer to the same, in which they averred that they had conveyed, by warranty deed, the property in question in the instant proceeding to the Michigan Building Corporation (which corporation was and is a defendant to the suit) and that that corporation by said conveyance took the fee to the premises and assumed the payment of the bonds and interest coupons secured by the mortgage in question, and it was after the filing of this answer that the complainants dismissed the bill as to the Dallagers. The appellant cites a number of cases in which it has been held that on a bill to foreclose a mortgage, the mortgagor, unless he has assigned the equity of redemption, must be made a party to the suit, but we are unable to see how these cases can control the instant question, as the said mortgagors were made parties defendant to the original bill, and it was because of the nature of their answer, apparently, that the bill was dismissed as to them, and we see no good reason why it should have been absolutely necessary to thereafter retain them in the cause. Nor do we think that it was necessary for the complainants, in view of the answer of the said defendants, to make proof as to the disposition of the

property by them.

The appellant next contends that "the bonds and coupons which the Company took up after the bill was filed were purchased, not paid, by it, and after the lapse of ninety days, no notice having been given, became subordinated to all other senior trust deed bonds and coupons, and whether so subordinated or not, could not be enforced in the instant case without a supplemental bill." (Italics ours.) After a careful examination of the argument of appellant in support of the present contention, we are of the opinion that the italicized portion of the instant contention is the only part of the same that requires an answer. The appellees contend that under the decision in Brown v. Miner, 122 Ill. 144, 137, it was not necessary to file a supplemental bill but that even if it be held that correct procedure required the filing of a supplemental bill, nevertheless, under the record in this case and the decisions in Kelly v. Galbraith, 37 Ill. App. 63, 67-71, and idem, 126 Ill. 593, 610-612, it was error without prejudice, and cannot avail the appellant. We believe that there is force in this answer of the appellees to the instant contention of the appellant. The bill notified the defendants "that it would become necessary pending the disposition of said foreclosure proceedings, for complainants to make further payments and disbursements in the purchase and payment of bonds and interest coupons secured by said trust deed and becoming due after the filing of said bill," and we find nothing in the record that indicates that the appellant was denied an opportunity to dispute the disbursements claimed to have been made by the complainants after the filing of the bill. The appellant, in his reply brief, states: "We objected to the proof of subsequently purchased bonds and coupons when the proof was offered before the master because it was not proper under the bill and we did not offer any defenses but rested on our objection." The only objection made to the proof

offered by the complainants was that it was "incompetent, irrelevant and immaterial and not a part of the claim for which the complainant is entitled to seek a foreclosure in this proceeding," and in the objections filed to the report of the master the appellant does not raise the question of the supposed variance. "To raise the question of variance, it is necessary for the defendant to indicate specifically the variance and point out in what it consisted so as to enable the court to pass upon the question intelligently and also to enable the plaintiff to so amend his pleading as to make it conform to the evidence." (Edward Kings Lumber Co. v. O. L. Chemical Wks., 237 Ill. App. 246, 255, and cases cited therein.) Under this rule, and the record in this case, the appellant must be held to have waived the point he now seeks to urge.

The appellant further contends that "it was error to allow the amount (\$218.10) claimed for plate glass insurance premiums paid, for the covenant as to insurance against loss or damage by fire 'and other insurance casualties,' did not apply to plate glass insurance, as that was not of the same general nature as fire insurance;" that "while the amount is comparatively small, it was error to allow the item of plate glass insurance premiums. The senior trust deed did not provide that plate glass insurance should be carried or paid for, unless it can be held to be included in the words 'other insurance casualties,' used in the provision with respect to fire insurance (Art. I, Sec. 3; Abst. 10); and we think the rule of ejusdem generis forbids it being so included." We think this contention is without the slightest merit. In our judgment the words "and other insurance casualties" are broad enough and plain enough to include plate glass insurance.

The appellant further contends that "as the decree was excessive to the extent that it included improper items as aforesaid, the allowance of \$5,000 for complainants' solicitors' fees was like-

were excessive, and it should have been reduced proportionately." This contention is predicated solely upon the assumption that the amount paid for the bonds acquired by Greengbaum Sons Investment Company after the commencement of this suit could not have been allowed the complainants without the filing of a supplemental bill. As we have heretofore held that the allowance of the said amount was proper we must also hold that the present contention is without merit.

The appellant next contends that "the order appointing a receiver pendente lite was made without the filing of any bond of complainant and did not recite the matters required by statute in order to authorize an appointment without such bond;" that "the order did not recite that there was notice, nor a full hearing, nor that the Court was of the opinion that a receiver ought to be appointed without such bond, nor show anything which a court of review could see constituted good cause for waiving such bond, and in each and all of these respects the order was fatally defective." It is a sufficient answer to the instant contention to say that the present appeal is from the final decree entered in this cause and that therefore the appellant is in no position to now question the sufficiency of the recitals in the order appointing the receiver pendente lite. Even if the appellant on this appeal could question the sufficiency of that order, the only ground urged by him in support of his present contention that has the slightest merit is that the order in question does not recite that the court was of the opinion that a receiver ought to be appointed without bond, and as the order was not a void one (see Talenti v. Krolik, 234 Ill. App. 407, 410-11), we would be required only to remand the cause with directions to the chancellor either to require the complainants to give a bond with such penalty and security and with such conditions as mentioned in the statute, "or upon notice and full hearing to

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, and who have been sworn in as such, in accordance with the provisions of the Act of March 3, 1879, entitled "An Act to provide for the better management of the public lands, and for other purposes."

state that such bond is not required, and to enter an order accordingly." (Ibid. p. 415.) The appellant made no objection, at the time of the making of the interlocutory order nor during the hearing in the lower court, to the appointment of the receiver, nor did he attempt by appeal from that order to question the sufficiency of the same, and he now, on an appeal from the final decree, for the first time seeks to raise that question. Under the record in this case it would be highly inequitable to allow him to do so.

We feel impelled to say that there is force and merit in the appellees' contention that "a perusal of the record in this cause and the arguments filed herein will show that, exclusive of the amount of \$215.15 paid for plate glass insurance herein, none of the errors complained of are based upon any injury to the appellant, but are predicated entirely upon clerical error in procedure."

The decree of the Circuit Court of Cook County should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

which shall have been in the possession of the party in interest for a period of not less than one year.

At the time of the making of the instrument, the party in interest shall be the owner of the property, and the property shall be the property of the party in interest.

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FRANCIS M. O'CONNOR,
Defendant in Error,

v.

LEE HAMMOND,
Plaintiff in Error,

and

CHARLES D. TOMLINE,
Defendant.

COURT, COOK COUNTY.

MR. JUSTICE BOGHLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action in case, Francis M. O'Connor, plaintiff, sued Lee Hammond and Charles D. Tomline, defendants. The case was tried before the court, with a jury, and a verdict was returned finding both defendants guilty and assessing the plaintiff's damages at the sum of \$600. Judgment was entered on the verdict. The defendant Lee Hammond has sued out this writ of error.

The declaration charges (*inter alia*) that on July 13, 1923, the defendants and each of them owned, operated and controlled motor cars which were then and there being driven in Lincoln Park on a north and south driveway; that the automobile of the defendant Tomline was proceeding in a southerly direction and the automobile of the defendant Hammond in a northerly direction; that the plaintiff was a passenger riding in the automobile of the defendant Tomline; that the defendants so carelessly and negligently managed and controlled their automobiles that the same collided, and that the plaintiff was thereby injured. Each defendant filed a plea of the general issue and each was represented by his own attorney. On July 13, 1923, the plaintiff.

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a stenographer, went to the office of the defendant Tomlin in reference to securing a position. Tomlin offered to drive the plaintiff down town, and at about 3:45 o'clock p. m. they started, in the automobile of Tomlin, from his office for the loop. The theory of fact of the plaintiff was that as the defendant Hammond proceeded northward there was a bus in front of him and that he endeavored to pass northward on the east side of the bus and that in doing so he collided with the car of the defendant Tomlin that was proceeding southward about the center of the roadway. The theory of fact of the defendant Hammond was that before the collision he had passed the bus that was then in front of him and was driving northward close to the east curb of the driveway when the defendant Tomlin approached from the north along the center line of the roadway at an excessive rate of speed, and then cut across the roadway in a southeasterly direction and collided with the front of the defendant Hammond's car, "taking the front of that car with it" and then traveled thirty or forty feet eastward into the park, where it hit a tree on the east side of the roadway; that he had brought his car practically to a stop before the collision; that his car was facing northeast and all but the rear wheels was on the "lawn or grass of Lincoln Park" after the collision. While portions of the testimony for the plaintiff support the claim that the collision occurred while the defendant Hammond was endeavoring to pass around the bus, the plaintiff, on cross-examination, admitted that the defendant Hammond was in front of the bus when the two cars collided; that "he got way around in front of the bus" before the collision.

The defendant Hammond strenuously contends that the great weight of the evidence supports his theory of fact and that the finding of the jury that he was guilty of negligence that

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premately contributed to the accident in question is unwarranted under the proof. We have carefully read the entire evidence in this case and we have reached the conclusion that this contention of the defendant Hammond is a meritorious one. As this case may be tried again, we refrain from analyzing and commenting on the evidence bearing on the instant question.

The judgment in the present case is a unit and must stand against both of the defendants or fail as to both (Livak v. Chicago & Erie R.R.Co., 290 Ill. 213, 326; Finlen v. Kelly, 310 Ill. 170, 176), and therefore the judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

33494

RYMAN S. ELAXMAN, UNION TRUST
COMPANY, a Corporation, and
DEPOSITORS STATE BANK,

Appellees.

MURPHY IN-A-DOR BED COMPANY,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was a trial of the right of property, in the County Court of Cook County, before the court without a jury. The court found the issues for the claimants and the right to all the property in all the claimants and entered judgment on the finding. The plaintiff in the original suit, Murphy In-A-Dor Bed Company, has appealed.

On October 25, 1928, Murphy In-A-Dor Bed Company, a corporation, recovered a judgment, in the Superior court of Cook County, against Samuel Schmalhausen for \$2,005.00, and execution issued. Under the writ the sheriff made a levy upon numerous chattels located at 5238 Woodlawn avenue, Chicago. On April 27, 1928, one Theodore Toppel, acting under the direction or upon the request of Schmalhausen, the then owner of the said premises, executed and delivered a warranty deed for the said premises to the Union Trust Company, a corporation, as trustee under the provisions of a certain trust agreement. It further appears that prior to April 27, 1928, Schmalhausen and his wife had entered into a trust agreement, dated March 23, 1927, with the Union Trust Company, as trustee, in which it is recited that the said Trust Company is about to take title to various parcels of real estate belonging to the said Schmalhausen and that when the said title is so taken, the earnings, avails and proceeds of said real estate "shall be held for the benefit of the following persons, to-wit: Samuel Schmal-

1. The first part of the report is a general introduction to the subject of the study.

2. The second part of the report is a detailed description of the methods used in the study.

3. The third part of the report is a discussion of the results of the study.

4. The fourth part of the report is a conclusion and a list of references.

5. The fifth part of the report is a list of references.

6. The sixth part of the report is a list of references.

7. The seventh part of the report is a list of references.

8. The eighth part of the report is a list of references.

9. The ninth part of the report is a list of references.

hausen, \$1 one hundredths, Bonnie Schmalhausen, \$1 one hundredths." About May 1, 1926, Schmalhausen, for the purpose of borrowing \$30,000 of the claimant Hyman S. Flaxman, executed his note to the latter for that amount, and Flaxman discounted the note with the claimant Depositors State Bank. At the same time Flaxman indorsed the note over to the bank and guaranteed the payment of the same, and Schmalhausen delivered to the bank, under a collateral security agreement, an assignment by himself and wife of their interest in the premises in question under the said trust agreement with the Union Trust Company, and he also delivered to the Depositors State Bank a bill of sale of certain chattels described therein and which were located at the premises in question.

The appellant raises a number of contentions, but in our judgment it is necessary to consider only one. The appellant, at the commencement of the proceedings and at the conclusion of the same, moved the court to dismiss the suit on the ground of misjoinder of parties claimant, both of which motions were denied, and the appellant strenuously contends that the action of the court in that regard was error and that the judgment should be reversed.

The claimants, Hyman S. Flaxman, Union Trust Company, a corporation, and Depositors State Bank, in the written notice served by them upon the sheriff, state that the claimants "claim to own, each of them, a part of that certain property which has heretofore by you been attached on a levy," etc. The Union Trust Company held title to the premises in question and it claimed to own certain of the chattels or "property" seized, on the theory that they were fixtures and belonged to the real estate. The Depositors State Bank claimed "a beneficial interest" in the chattels or "property" claimed by Union Trust Company and it also claimed to own certain of the chattels seized, by reason of the bill of sale given to it

by Schmalhausen at the time the note for \$30,000 was discounted. While the record does not clearly show upon what theory Flazman based his claim, counsel for claimants argue that he had "a beneficial interest" in the collateral security held by Depositors State Bank.

The claimants contend that "the action partakes of the nature of an equitable proceeding," and that "the claimants were properly joined as parties plaintiff, though not all interested in each item of property." In Illinois the trial of the right of property under the act (Par. 60, Chap. 77, Callaghan's Ill. Stat., Vol. 5), is a "proceeding at law" and "is merely another form of the action of replevin without formal pleadings." (Gallere v. Thomas, 185 Ill. 384, 386.) We find nothing in the act itself to sustain the contention that two or more persons, each claiming to own a part of the chattels levied upon, may all join as parties claimant in a trial of the right of property. In fact, in our judgment, the plain language of the act precludes any such interpretation. The claimants at one point in their argument state that the question raised has not been passed upon in this state, but at another point, they argue that the case of Gaar, Scott & Co. v. First Nat'l Bank, 20 Ill. App. 611, is an authority in support of their contention. In that case the claimants were joint mortgagees under a chattel mortgage that conveyed the property in question to secure the payment of a number of promissory notes, and the court held that "the mortgage being to them jointly, all properly joined as claimants, although one or more of them may then have ceased to have an existing debt secured by the mortgage." This decision, in effect, is against the contention of the claimants. In Lipe v. Cernak, 205 Ill. App. 246, the court held that because the property could not, under the facts of the case, be awarded to both plaintiffs, the action could not be maintained by them jointly and that

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the action of the trial court in dismissing the suit for misjoinder of plaintiffs, on defendants' motion, was proper. Under the facts of the instant case the trial court could not have properly awarded the chattels to all the claimants.

After a careful consideration of the question involved in the instant contention of the appellant, we have reached the conclusion that the trial court erred in overruling the appellant's motion to dismiss on the ground of misjoinder of the parties claimant, and the judgment of the County Court of Cook County is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

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33483

MILTON J. KAUSAL,
Appellee.

v.

RAY F. MUDD MOTOR COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

In a trial in the Circuit Court of Cook County, in an action for damages for malicious prosecution, there was a verdict for the plaintiff and his damages were assessed in the sum of \$1,701. Judgment was entered on the verdict and this appeal followed.

We find the material facts to be substantially as follows: On August 17, 1926, the defendant, through its assistant treasurer, filed a sworn complaint in the Municipal Court of Chicago, in which it charged that the plaintiff, on July 26, 1926, with intent to defraud, made a check on the Standard Trust & Savings Bank for \$394, payable to the defendant, and that he then and there received from Ray F. Mudd the sum of \$394, then and there knowing that he did not have sufficient funds or credit in said bank to meet the payment of said check when it was presented for payment, in violation of paragraph 164, chapter 38, Revised Statutes. On August 23, 1926, the plaintiff was arrested on the charge and on November 12, 1926, upon trial by jury, was found not guilty. The defendant was in the automobile business and had two branches, one of which was located in Oak Park. The plaintiff was twenty-four years of age, single, and lived with his parents. He worked for the John B. Kausal Coal Company, which was owned and conducted by his father.

In May, 1926, he made a deal with the defendant company to buy a Ford car and paid \$125 on account of the purchase price. This car was not delivered to the plaintiff. In July, 1926, plaintiff saw in the defendant's show windows a used Chrysler car. Olson, the defendant's salesman, told him the price of the same was \$1,000, and the plaintiff stated that this price was too high. Olson then asked him if he would be interested in a new Chrysler car, and he said that he might. A few days later Olson telephoned the plaintiff and induced the latter to go with him to the place of business of the Marquardt Motor Company, which dealt in Chrysler cars. There the plaintiff was shown a new Chrysler roadster equipped with Vogue tires, which were not the regular tire equipment for that car. Marquardt told the plaintiff and Olson that he would take the used Chrysler car belonging to the defendant, at a valuation of \$1,000, and that he would also allow the plaintiff a credit of \$50. If the deal went through, the plaintiff was to pay one-third down "and the balance would be taken care of by a series of notes, payable monthly, eighteen notes." The plaintiff said that if the deal were to go through he would insist that the new Chrysler car be equipped with Vogue tires without extra charge, and Marquardt said that he would want \$25 extra if such tires were placed on the machine. On the following Saturday, July 24, Olson telephoned the plaintiff and they met at the defendant's office and there Olson told the plaintiff that Marquardt wanted \$1,022 for his car, with an additional \$25 if the plaintiff insisted on Vogue tires. The plaintiff said that the proposition of Marquardt looked all right to him but that he would not pay the \$25 for the Vogue tires. Olson then held a conversation on the telephone with Marquardt, after which he told the plaintiff that Marquardt would not accept the proposition of the plaintiff, to which the plaintiff replied that he would not go through with the deal. Olson then wrote out an order which he handed to the

plaintiff, at the same time saying to him: "I will tell you what you do, you sign this order at the basis you are willing to go through on, and give me a check for \$194, and I will see what I can do for you with Mr. Marquardt," to which plaintiff replied: "Why should I give you a check, I am not taking the car?" Olson then said: "That is all right, I just want to show it is an order; now, if I shove it under his nose I think I will get him to accept the deal." The plaintiff objected to signing the order and making the check, but after Olson promised him that until the deal was consummated and plaintiff got the car from Marquardt, the defendant would not use the check, he gave Olson a check for \$194 and also signed an order for the used car that belonged to the defendant. On this order appears the following:

"(\$50.00 Marquardt Motor Company credit

(\$125.00 R. F. Mudd Co. credit

\$394.00 Check from M. J. Kausal

and opposite said figures he (Olson) drew an arrow pointing to the following language: "To apply as 1st payment on new Chrysler Roadster from Marquardt Motor Co., including Vogue tires or for Marquardt Motor to adjust difference."

Olson then asked the plaintiff if he would be willing to have his father sign on the notes with him, to which the plaintiff replied: "Absolutely not, that if they were not willing to accept my signature alone on the contract and notes that I would not go through with the deal." Olson then stated that he would telephone the plaintiff on the following Monday morning and let him know how he (Olson) came out with Marquardt. The plaintiff testified that Marquardt was not present at the defendant's office on this occasion and that he (plaintiff) did not see the used Chrysler car at that time, nor was it delivered to Marquardt that evening. The defendant introduced evidence to the effect that on that occasion Marquardt was present at the defendant's place of business and that the three-cornered deal was then and there consummated and the used Chrysler car de-

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livered to Marquardt by the defendant, and that Marquardt, in the presence of the plaintiff, drove the car from the premises of the defendant. We are satisfied, after a careful examination of the record, that the jury were warranted in refusing to believe this evidence. The testimony for the plaintiff directly contradicts defendant's theory of fact, and certain testimony of the defendant impeaches it. The order that Olson induced the plaintiff to sign shows on its face that the deal between the plaintiff and Marquardt was not fully consummated, and on the face of the order appears the following: "Date Delivered 7-26-36." We think there is much force in the contention of the plaintiff that the jury were justified, under all the facts and circumstances in the case, in finding that Marquardt was not present in the defendant's place of business on Saturday, July 24. Olson, on cross-examination, was finally compelled to admit that the plaintiff and Marquardt did not come to an agreement as to the Vogue tires and that "in the wind-up it was" agreed "that the deal between the Mads Motor Company and Marquardt and Milton Kausal was not to be consummated until all three parties had agreed to all the terms of the transaction," and that he wrote the order because "Mr. Kausal, Jr. asked me to give him some kind of a memorandum of why, or what he had paid and what the transaction would be." (Italics ours.) Olson further admitted that the tire question was not settled that evening and that so far as he knew the plaintiff and Marquardt might never come to an agreement on that subject, and that Marquardt refused to agree to it that evening. When hard-pressed on cross-examination, Olson also practically conceded that the deal between the plaintiff and the defendant could not go through until Marquardt and the plaintiff agreed as to the terms for the new car. It is significant that on Saturday evening the plaintiff was not asked to sign a sales agreement with the Marquardt company or the note that he would be re-

quired to give that company if the transaction were consummated. The plaintiff never received the Ford car nor the \$125 that he deposited in partial payment of the same, nor did he receive the used Chrysler car, nor the new Chrysler car. On Monday morning, July 26, the defendant deposited the plaintiff's check in its bank. On the same morning the plaintiff made a deposit of \$370 in his bank, which he thought would make his balance sufficient to cover the check if the deal went through. His actual balance then was \$390.31. On July 28 he made a further deposit of \$35. The plaintiff did not know until July 31 that the check had been returned, on July 27, with the notation "N.S.P." on it. On July 26 the father of the plaintiff, learning of the proposed transaction, telephoned Olsen that he did not wish the deal to go through. Olsen told the father that the deal had gone through and that he wanted the father's signature to the contract. The father talked to Ray Mudd on Tuesday morning and strongly objected to the deal going through, and Mudd said that the deal was consummated and the check had been banked. On July 31 the plaintiff, acting under the advice of his father, stopped payment of the check. About five days prior to the arrest of the plaintiff, Mudd asked the father what the plaintiff was going to do about making the check good. The father replied that he did not know why the check should be made good, that nothing had been delivered to the plaintiff, to which Mudd replied: "If he don't make the check good I am going to send him to jail. It is a penitentiary offense and I am going to send him to jail." After the arrest Mudd said to the father: "I told you that I would have him arrested, and there is only one way that I will drop the matter, is for him to pay the check." Mudd, who was well acquainted with the plaintiff and his father, admitted, on cross-examination, that he had the plaintiff arrested in order to force the collection of the check and

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that he would have stopped the prosecution if the check had been paid.

The defendant contends that the verdict of the jury is manifestly against the weight of the evidence. After a very careful consideration of all the facts and circumstances in this case, we have reached the conclusion that there is no merit in this contention. We are in accord with the verdict.

The defendant next contends that it was error for the court, over the objection of the defendant, to allow the plaintiff to testify as to his intention at the time he delivered the check in question to the defendant. The defendant argues that the intent of the plaintiff was not an issue in the instant case and that the sole question was, whether, or not the prosecutor, at the time he made the charge, had reasonable grounds for belief that the plaintiff was guilty of the offense charged. When the plaintiff was on the stand the following occurred: "Q. (by counsel for plaintiff): Did you ever give the Ray W. Hudd Motor Company a check with intent to defraud them? Mr. McKee (counsel for defendant): I object to that. If the Court please I object to the leading form of the question." As the defendant did not see fit to object to the question on the ground that it was incompetent and irrelevant it cannot now raise the instant contention.

The defendant contends that the court erred in refusing the following instruction offered by it:

"The Court instructs the jury as a matter of law that Section 164 of Chapter 38, Criminal Code, Revised Statutes of the State of Illinois, provides as follows:

"That any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depository, and thereby obtains from any person any money, personal property or other valuable thing knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor, and upon conviction thereof shall

There is a great deal of evidence in the record that the

State

The defendant's testimony is not credible and the jury is
not bound to believe it. The State has the burden of
proving its case and the defendant has the burden of
proving his innocence. The jury is the trier of fact and
it is its duty to weigh the evidence and reach a verdict.

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it is its duty to weigh the evidence and reach a verdict.

be fined not more than one thousand dollars or imprisoned not more than one year, or both. The making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of such check, draft or order."

The Court further instructs the jury that if they believe from the evidence in this case that the plaintiff delivered to the defendant his check for the sum of \$394, dated July 26, 1936, drawn on the Standard Trust and Savings Bank to the order of the defendant herein and signed by the plaintiff and by reason thereof obtained personal property, to-wit: one used Chrysler roadster of the value of \$1,000, and that at the time he drew such check and delivered the same to the defendant that he did not have sufficient funds in such bank for the payment of such check in full upon its presentation, and that said bank refused to honor said check because the plaintiff did not have sufficient funds on hand to honor the same and returned the same to the defendant, then the Court instructs you, as a matter of law, that the drawing and delivering of such check as aforesaid to the defendant was prima facie evidence of an intention on the part of the plaintiff to defraud the defendant and furnished probable cause for the issuance of a capias as provided by Paragraph 164 of Chapter 38, Revised Statutes of the State of Illinois, and if you so find from the evidence, your verdict should be for the defendant." (*Italics ours.*)

The trial court was justified in refusing this instruction. It is subject to a number of just criticisms, but it is necessary to mention only one. By this instruction the jury would be justified in finding a verdict for the defendant, even though the jury believed from the evidence that the defendant, at the time it made the charge, knew from facts and circumstances within its knowledge that the plaintiff was not guilty of the offense charged.

The defendant next contends that the verdict is excessive. We cannot agree with this contention. The plaintiff was arrested in the office where he was employed, by three police officers, and taken to a police station and searched, and everything that he had in his pockets was taken away from him, and he was then locked in a cell in the basement of the station, where he was confined for about two hours. He was then taken to the captain's office in the station and kept there in custody for about four hours, when he was admitted to bail. He employed counsel to defend him, to whom he paid \$250

for fees, and he also employed a court reporter, to whom he paid \$30. He was required to make three court appearances in the criminal proceeding. In a case of this kind there are a number of elements that enter into the question of damages: (a) a recovery for the depreciation of his liberty; (b) value of time lost - interruption in business; (c) expense of litigation; (d) mental suffering; (e) injuries to credit and reputation, and (f) exemplary damages. We are satisfied that the jury were justified in finding that the defendant, in causing the arrest of the plaintiff, was guilty of a high-handed act and that it used the criminal process for the sole purpose of coercing the plaintiff to pay the check and to consummate the deal in question, and that the complaint was falsely made. It is the law of this state that the amount of the damages in a case of this kind is, in general, a question for the jury and that unless there is something in the record showing that the jury has been influenced in its determination by passion, prejudice or some improper motive, the court will not interfere to disturb its verdict. Many cases might be cited where judgments for a larger amount have been sustained under facts and circumstances similar to those in the instant proceeding. In Hollis v. Rosenstiel, 197 Ill. App. 637 (decided by this division of the Appellate Court), the court held that a judgment for \$1,000 was not excessive. In that case the plaintiff was arrested upon a complaint charging him with assault and battery, and there appears to have been no evidence as to any expenses incurred by the plaintiff in defending the charge. The charge made against the plaintiff in the instant suit is of a more serious character.

The defendant contends that the verdict of the jury was the result of passion and prejudice caused by the conduct and remarks of counsel for the plaintiff during the trial. The counsel for the defendant has apparently searched the record in an effort to

sustain the instant contention. During the examination of plaintiff, said counsel objected to a certain answer on the ground that it allowed the witness to interpret his own intention. The following then occurred: "Mr. Levine (counsel for plaintiff): I don't know, you say that he had intent to defraud you and he said he did not. Mr. McKean: We don't say anything. Mr. Levine: Oh, don't you? Mr. McKean: Not in this lawsuit. Mr. Levine: You had him arrested on the strength of what you said." The defendant now complains of these statements of the counsel for the plaintiff. No objection was made to them, and the present contention is clearly an afterthought.

The defendant next complains of the following: Olson, a witness called on behalf of the defendant, while testifying on the direct, was asked to look at certain documents and to refresh his recollections from them, and the following then occurred: "Mr. Levine: Of course, strictly speaking, it is not proper to hand the witness a document he didn't make himself. Mr. McKean: That isn't the rule of law, and I am sick and tired of counsel referring to this is the law and that is the law. Mr. Levine: You will be sicker before the case is over." Defendant now complains of the last statement of Mr. Levine. It made no objection to it at the time, and is, therefore, in no position to complain of it now. Moreover, it is apparent that the statement of Mr. Levine was invited by the prior improper statement of Mr. McKean. During the cross-examination of the witness Olson, the following occurred: "Q. You didn't care whetherausal got the new Chrysler, all you were interested in was selling off the old one? Mr. McKean: Just a minute. The witness: A. That was my part. The Court: He answered it. Mr. McKean: I object to bulldozing the witness. Mr. Levine: I am not bulldozing him. The Court: He answered it; it may stand, but the question should not be asked in that manner, Mr. Levine. The answer may

stand." The defendant contends, as we understand it, that the question of the cross-examiner was asked in a loud, menacing tone of voice and that the court should have ruled that the cross-examiner was bulldozing the witness. There is nothing in the record to show that the question was put in a loud, menacing tone of voice, and so far as the record shows the only objection that could properly have been made to the question was that it was double. In view of the entire examination of Olson, we are of the opinion that the subject matter of the question was a proper inquiry on cross-examination. The defendant next complains of the following: During the cross-examination of Marquardt, a witness for the defendant, the following occurred: "Q. How many contracts did you get? A. I don't want to be made a dummy of. Q. I am not trying to make a dummy of you. Somebody else has done that for me. Mr. McKee: Just a minute, I think the jury should be instructed to disregard remarks of that kind. The Court: The jury will disregard it." The defendant complains, and with justification, that the remark of the counsel for the plaintiff was improper, but it will be noted that counsel for the defendant made no objection to the remark and merely asked the court to instruct the jury to disregard remarks of that kind and that the court so instructed the jury. Moreover, the answers of this witness at times were improper and counsel for the defendant made no effort to check the witness in that regard although it was apparent that the said answers were of a kind that naturally tended to provoke a cross-examiner. We will cite a few of the answers: "You bet I did;" "You will have to ask another witness;" "You are getting too thorough for me;" "I don't want to be made a dummy of." The defendant contends that it was prejudicial error for the counsel for the plaintiff to state to the jury, in the closing argument, that Judge James did not examine any evidence when the warrant was issued and that the defendant's

assistant treasurer lied at the time of making the complaint. The record shows that the defendant made no objection to the statements in question. We do not wish to be understood as holding that the conduct of the counsel for the plaintiff was entirely free from censure, but we may add that the same may be said as to the conduct of the counsel for the defendant. In the recent case of Lamar v. Collins, 232 Ill. App. 238 (certiorari denied by the Supreme Court), in passing upon a question as to whether or not the jury was improperly influenced by a certain act of the plaintiff in that case, we said: "In this enlightened country and under our system of universal education, jurors must be presumed to possess reason and judgment." We adhere to that statement. In the present case we have held that the finding of the jury was justified by the evidence and that the amount of the damages was not excessive, and it follows, if we are correct in so holding, that the verdict in the instant case is a just one and that therefore the conduct of the counsel for the plaintiff could not have prejudiced the rights of the defendant.

In our opinion the judgment of the Circuit Court of Cook County is a just one and it should be and it is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

33481

THOMAS H. MULLAY,
Appellant,

v.

BERTHA HAVIAR and
JOHN HAVIAR,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas H. Mullay, plaintiff, sued Bertha Haviar and John Haviar, defendants, in the Municipal Court of Chicago, in an action in contract. The plaintiff, a real estate agent, sued to recover \$400 commission that he alleged was due him for procuring a purchaser for defendants' property, located at the corner of Sixteenth and Morgan streets, Chicago. The case was tried before the court, with a jury, and a verdict was returned finding the issues against the plaintiff. Judgment was entered on the verdict and this appeal followed.

The affidavit of merits alleged (inter alia) that the signature of the defendant John Haviar was obtained while he was intoxicated and in no condition to understand the nature or purport of the document he signed, and that the signature of the defendant Bertha Haviar was obtained by plaintiff "through inciting and instigating her said husband John Haviar, while in said intoxicated and irresponsible condition, to offer threats and force to said Bertha Haviar to force her to sign said contract, and that because of said threats to kill her, and personal violence to her person made and done by said Haviar while in said drunken condition, said defendant Bertha Haviar signed her name to said contract, and for no other reason;" "defendants further say that they received

no consideration or money whatsoever for said contract, either from plaintiff herein, or his said principal Meshinsky, and that said purported contract has never been carried into effect."

The plaintiff contends that the judgment is against the manifest weight of the evidence. The plaintiff argues, in support of this contention, that the defendant John Nevlar was not intoxicated at all, "or if he was under the influence of liquor, his intoxication was not so excessive as to deprive him of reason so that he was incapable of understanding the nature of the transaction in which he was engaged;" that "the evidence fails to show that Bertha Nevlar was in such fear of her life or of bodily harm at the time as to subjugate her mind and will to such an extent that her action in signing was solely the result of such fear," and that "the evidence fails to show that the plaintiff had anything to do with the alleged drunkenness of John Nevlar or his threats against his wife, or that he induced, instigated, encouraged, or was fully cognizant of either." We have carefully read the entire evidence in this case and we are satisfied that there is no merit in the instant contention. We are in full accord with the verdict of the jury.

The plaintiff next contends that "the court erred in failing or refusing to strike out certain prejudicial statements and arguments made by defendants' counsel before the jury." We have carefully considered this contention and we find no merit in it.

The plaintiff states that his "principal contention" is that "the refusal of the court to permit the original contract to be transmitted to this court in connection with the transcript of the record, without apparent reason, was an abuse of judicial discretion." The appeal bond in the present case was approved and filed in the office of the clerk of the Municipal Court on March 5, 1929.

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The original bill of exceptions was signed by the trial judge on April 2, 1939. It appears from a second bill of exceptions signed by the trial judge on April 12, 1939, that on April 9, 1939, the plaintiff moved the court to instruct the clerk of said court to transmit to the Appellate Court the original "Plaintiff's Exhibit 1," and that the court on April 10, 1939, denied the motion. This bill of exceptions shows that the counsel for the plaintiff merely made the motion and made no statement or showing to the trial court as to why an inspection of the original paper would be important to a correct decision of the case by this court. The defendants contend that the plaintiff had perfected his appeal some days before the making of the motion in question and that a perfected appeal operates to stay any further proceedings by the court rendering the judgment, and that therefore the motion of the plaintiff came too late. The defendants cite, in support of this contention, City of Chicago v. Lord, 281 Ill. 414, 417, and The People v. Pam, 276 Ill. 131. It is not necessary for us to pass upon this contention of the defendants. The plaintiff, in support of his contention, relies upon rule 13 of this court, which provides that "whenever, in the opinion of the presiding judge of any inferior court, an inspection of an original paper in an action of appeal or writ of error shall be important to a correct decision of the case, such judge may make such order for the transmission, safe keeping and return of such original paper as to him may seem proper," etc. If we assume that we have the power to pass upon the act of the judge in denying the motion in question, nevertheless, we find nothing in this record to warrant us in finding that the ruling in question was an abuse of judicial discretion. It is to be noted that the plaintiff, at the time of making the motion, did not see fit to even state to the court why he thought an inspection of the original paper would be important to a correct decision of the

case in this court.

In conclusion we may say that in our opinion the jury, if they acted honestly and reasonably, under the evidence in this case, could have returned no other verdict.

The judgment of the Municipal Court of Chicago should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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33490

NOVAK GROCERY COMPANY,
a corporation,
Appellee,

v.

GEORGE RASMUSSEN COMPANY,
a corporation,
Appellant.

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This cause is now before us on a rehearing granted upon a petition filed by the plaintiff.

Novak Grocery Company, a corporation, plaintiff, sued George Rasmussen Company, a corporation, defendant, in the Circuit Court of Cook County, in an action of account. There was a trial before the court, with a jury, and at the conclusion of all the evidence, on motion of the plaintiff, the court instructed the jury to find the issues for the plaintiff and assess the plaintiff's damages at the sum of \$23,446.21. Judgment was entered on the verdict and this appeal followed.

The plaintiff is engaged in the wholesale grocery business, and on March 17, 1920, entered into a written contract with Marceline Garcia for the purchase of 16,000 bags of fine cane granulated sugar, packed in double bags of 100 pounds net weight each, to be delivered as follows: 4,000 bags during May, 1920; 4,000 bags during June, 1920; 4,000 bags during July, 1920, and 4,000 bags during August, 1920, the delivery to be f. o. b. railway cars at Marine City, Michigan. The contract also provided that it was "contingent upon strikes, accidents, fires, or other delays beyond seller's control." On April 21, 1920, the plaintiff entered into the following written contract with the defendant:

Journal of Management Education 30(6)p.789-804

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"Contract

We have this day, April 21st, 1920, sold to George Rasmussen Company, of Chicago, Illinois, for the account of the Novak Grocery Company, of Chicago, Illinois, eight thousand (8,000) Bags Fine, Cane, Granulated Sugar, packed in double bags of 100 pounds net weight, each, to be delivered as follows:

2000 Bags during May, 1920

2000 Bags during June, 1920

2000 Bags during July, 1920

2000 Bags during August, 1920

At twenty-seven dollars (\$27.00) per hundred pounds, free on board railway cars at Marine City, Mich.

Payment: Net cash at sight, payable in New York or Chicago, Ill., funds on presentation of Bill of Lading and duplicate invoices.

Seller's obligation as to delivery is complete upon presentation of Bills of Lading.

All additional Import Duty, Excise or other taxes hereafter levied on the raw or refined sugar necessary to fill this contract, to be for buyer's account in addition to the price specified.

If certificate of origin required, cost to be for buyer's account.

Delivery complete on receipt of goods by the carrier.

This contract contingent upon strikes, accidents, fires or other delays beyond seller's control.

Accepted

Accepted

THE NOVAK GROCERY CO.

VICTOR O. NOVAK (Seller)

GEO. RASMUSSEN CO. (Buyer)

P. H. RASMANN

JOHN F. JACQUES CO. (Broker)

This contract is sold against our contract with Marceline Garcia, of New York City, New York, in accordance to above specifications.

Deliveries to purchaser to be prorated through the various months on the same basis as shipments are made on his contract by the Seller. (This last clause on side of contract. Italics ours.)

The proof shows that both parties treated the paragraph at the bottom and the paragraph on the side of the contract as parts of the contract. The defendant admits in its brief "that during May, 1920, there was no sugar and plaintiff received none from Garcia under its contract; that during June, 1920, plaintiff received 710 bags of sugar which was delivered to and accepted by George Rasmussen Company; that in July, 1920, no deliveries were made by Garcia to the plaintiff." The proof is undisputed that the plaintiff delivered to the defendant all the sugar that it received from Garcia, under its contract of March 17, 1920, before the breach of the contract by the defendant. We shall hereafter refer to this breach. The pleadings of the defendant admit, and its counsel expressly admitted

during the trial, that on August 20, 1920, the plaintiff tendered to the defendant 1,150 bags of sugar that it received from Garcia and that the defendant refused to accept the same. On July 29, 1920, the plaintiff sent to the defendant a letter containing the following:

"Referring to our contract with you dated April 21, 1920, for 8,000 bags of Standard Cane Fine Granulated Sugar, to be delivered during the months of May, June, July, Aug., we beg to advise that Marcelino Garcia, from whom we purchased the sugar which we resold to you, is not shipping sugar to us from Marine City, Michigan, in the quantities required by his contract, claiming that he is prevented by transportation difficulties and other causes beyond his control from obtaining an adequate supply of raw sugar.

We stand ready to ship you on your contract with us, sugar from Marine City, Michigan, as and when we receive the same. In the meantime, and in order that there may be no further delay in the performance of our contract, we stand ready to ship you and hereby tender Standard Cane Fine Granulated Sugar of the same character and quality as the Marine City sugar, to be delivered to you free on board cars Chicago, freight from Marine City, Michigan, to Chicago to be added to the purchase price.

We call attention to the fact that your contract specifies 'Standard Fine Granulated Sugar' and not sugar of any particular refinery.

Will you kindly advise us promptly whether we shall ship you sugar in accordance with your contract or in compliance with the foregoing tender."

(Italics ours.)

On August 2, 1920, the defendant sent to the plaintiff a letter containing the following:

"We have yours of the 29th instant regarding sugar on contract of April 21st.

Regarding our acceptance of this sugar, we wish to say that we wish it distinctly understood that we will accept none of this sugar except as governed by the above mentioned contract, including the paragraph at the bottom as well as that on the sides of the contract." (Italics ours.)

In this letter the defendant treats the contract as in full force and insists upon the strict observance of the provisions relating to the Garcia contract. On August 17, 1920, the plaintiff sent to the defendant a letter containing the following:

"We have been advised today by Marcelino Garcia that shipments from Marine City went forward last week, and the balance will be shipped this week immediately upon receipt of the B/L covering these shipments, we shall turn same

over to you to apply on your contract with us dated April 21, 1920, for 8,000 bags of sugar."

On August 20, 1920, the plaintiff tendered to the defendant bills of lading for 1,150 bags of sugar that it had received from Garcia under the contract of March 17, 1920. The bills of lading were refused and, apparently, no reason was given for the refusal. On August 26, 1920, the defendant wrote the plaintiff a letter in which it said:

"Please take notice that our contract with you of April 21, 1920, for delivery of 8,000 bags of sugar for each of the months of May, June, July and August, to be delivered from your contract with Marcelino Garcia, upon which no deliveries have been made, is hereby cancelled and that no deliveries will be accepted by us upon said contract."

On August 27, 1920, the plaintiff wrote the defendant a letter in which it said:

"Replying to your favor of the 26th inst., we beg to advise you that you have no right whatever to cancel your contract with us dated April 21, 1920. We have delivered you sugar upon this contract as promptly as sugar was received by us from Marcelino Garcia. On the 21st day of April, 1920, we delivered you 710 bags on account of May delivery, and on the 16th day of August, we tendered you 1,150 bags which we offered to deliver to you under our contract with you. You absolutely refused to accept this tender and stated to our representative at that time that you would not accept any sugar which we might tender to you under our contract, and acting upon the same, we shall hold you for damages for the difference between the contract price and the market price of the sugar which we tendered to you and which we were ready to deliver."

Under the contract between the parties in this case the plaintiff sold to the defendant sugar that was deliverable to the former under its contract with Garcia and deliveries to the defendant company were to be "pro-rated through the various months on the same basis as shipments are made" by Garcia under his contract with plaintiff, and the performance by the plaintiff was "contingent upon strikes, accidents, fires or other delays beyond seller's control."

The plaintiff delivered to the defendant all the sugar that it received from Garcia prior to August 20, 1920, and on that

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

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The first of these is the fact that the
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THE UNIVERSITY OF CHICAGO

date it tendered 1,180 bags, which it had just received from Garcia, which tender was refused, and on August 26 the defendant repudiated the contract and stated "that no deliveries will be accepted by us upon said contract." Under the undisputed facts in the case the trial court ruled correctly in instructing the jury to find the issues for the plaintiff.

The defendant contends that the court excluded proper evidence offered on behalf of defendant. The defendant thus states its point under this contention: "The defendant offered testimony of two witnesses to show that the contract in question when first offered for its signature did not contain the marginal quotation and postscript contained therein, but that the same was added at the instance of the defendant for the purpose of insuring to it deliveries of a certain grade of sugar as soon as received by the plaintiff in installments of not less than 2,000 bags of sugar per month." There is no merit in this contention. It is not disputed that the contract contained the two paragraphs before the parties signed it and the defendant, in its letter of August 2, 1920, stated: "We wish it distinctly understood that we will accept none of this sugar except as governed by the above mentioned contract, including the paragraph at the bottom as well as that on the sides of the contract." There is no reasonable doubt as to the meaning of the contract. In fact, the parties interpreted it in the same way. As the plaintiff argues, the court ruled correctly in excluding the offer of the defendant "for the reasons: (1) that it violated the parol evidence rule; (2) that the meaning of the contract was clear and unambiguous; and (3) that even if admitted such evidence would have thrown no light whatever on the meaning of the contract."

The defendant next contends that the court admitted improper evidence on behalf of the plaintiff. The point made in support of the present contention is that it was reversible error

for the trial court to permit an officer of the plaintiff to testify, in effect, that at all times before the repudiation of the contract by the defendant the plaintiff was ready and willing to deliver to the defendant all sugar received by it from Garcia. This contention is without the slightest merit, as the undisputed proof is that the plaintiff promptly delivered to the defendant all the sugar it received from Garcia before the defendant's breach. The evidence in question was non-essential to the right of action of the plaintiff, but its admission was harmless.

The defendant next contends that the court erred in denying its motion to instruct the jury to find the issues for it. The defendant argues, in support of this contention, that it was essential that the plaintiff prove that it was at all times ready, willing and able to deliver and that it tendered delivery under the contract, and that the letter of the plaintiff of July 29 is "an admission of inability to comply with the terms of his contract with plaintiff and was an abandonment thereof by it and entitled defendant to rescind and refuse delivery thereafter." It is a sufficient answer to this contention to say that the said letter merely gave the defendant the option of accepting shipments of sugar from other refineries or of insisting upon Garcia sugar. It concludes with these words: "Will you kindly advise us promptly whether we shall ship you sugar in accordance with your contract or in compliance with the foregoing tender." The defendant clearly understood at the time that this letter was only an option offer and in its reply letter of August 2 it so treated it.

The defendant contends that, in any event, the plaintiff's damages, under the contract and the proof, should be limited to the 1,150 bags that were actually tendered and that the defendant refused to accept. This contention is a meritorious one. The plaintiff concedes, in its brief, that under the contract "the

Novak Grocery Company sold and the George Hammussen Company bought sugar deliverable to the former under its contract with Marcelino Garcia," and under the plaintiff's interpretation of the contract the defendant was not obliged to receive any sugar from the plaintiff unless the latter received the same from Garcia under its contract with him. The plaintiff, in its letter of July 29, 1920, so construes the contract. The evidence fails to show that the plaintiff received any sugar from Garcia under its contract with him after the receipt of the 1,150 bags. The plaintiff contends that after the defendant's repudiation of the contract and the plaintiff's acceptance thereof it was not obliged to tender any further shipments of sugar to the defendant, and it cites in support of this contention Osgood v. Skinner, 111 Ill. 229, which is an authority in support of plaintiff's contention. But it is there held that "an actual tender is unnecessary where the seller is ready, able and willing to perform on his part and the tender would be a mere useless form. If, before or at the time of performance, the purchaser has declared his intention not to perform or refuses to do so, the seller need only prove that he was ready and willing to perform on his part." (Italics ours.) As the plaintiff failed to prove that it received any further sugar from Garcia under its contract with him after the receipt of the 1,150 bags, it failed to prove, as to the defendant, that it was "ready, able and willing to perform" on its part. But the plaintiff contends that it tendered proof "that after acceptance of breach the appellee received other shipments of sugar from Garcia, which could have been delivered on appellant's contract, (Rec. 119-112). Appellant objected to any evidence on this point. It cannot now take advantage of the absence of proof, even if it were relevant and material." In support of its contention it cites certain cases (Mahl v. Brooks, 212 Ill. 154, 157; Owen v. Crumbaugh, 228 Ill. 230, et al.) which held that one cannot complain, on appeal, that

a fact was not proved if proper proof thereof was prevented by his objection. The defendant does not challenge the correctness of the rule stated, but it insists that the offer made by the plaintiff during the trial, and upon which it now relies, must be considered in the light of another elementary rule stated in many cases. In Lucas v. Beebe, 88 Ill. 427, the appellants offered to prove by a witness that there was no consideration for a bond, that the consideration had entirely failed, and that it had partially failed, and in passing upon the offer made the court said: "The offer was general, not specifying what the witness would state, or the specific facts he could prove by the witness. In such a case, the offer should be, to prove facts that would show a want of, or a total or partial failure of, consideration - not as the offer was made here, to prove a mere conclusion of law. Had the facts been specifically stated, it might have appeared that they would not tend in the slightest degree to establish either defense." In Martin v. Martin, 224 Ill. 84, 88, the counsel for the appellant made the following offer: "Now, in order to get the case clearly before the court, we offer to show by the witness that the firm of James Bros. & Co. was insolvent at the time of the levying of the execution, and remained so, and about six months after the replevin action was commenced they made an assignment for the benefit of creditors, and that the assets of the firm paid about thirty cents on the dollar;" and the court held that "the offer to prove that the firm was insolvent was but an offer to prove a conclusion, and as the objection of the appellee on the ground of incompetency, irrelevancy and immateriality was properly sustained," and the ruling in Lucas v. Beebe, supra, is quoted with approval. In Court of Honor v. Singer, 123 Ill. App. 406 (opinion by Mr. Justice Farmer), it was held that an offer of proof which consists of the statement of the conclusions of counsel is insufficient, and that the precise evidence sought

to be introduced should be substantially recited in the offer. In Kernan v. Drew, 144 Ill. App. 386 (opinion by Mr. Justice Libell), it was held that an offer of proof must embody an offer to prove facts which will establish the legal claim or defense relied upon. Many other cases to the same effect might be cited.

The following is the part of the record upon which the plaintiff relies in support of its present contention: "Q. (by counsel for plaintiff) Mr. Novak, after the 20th of August, and before the 1st of August, could the Novak Grocery Company have delivered to George Hammussen Company the remainder of the two thousand bags of sugar called for? Mr. Coolke (counsel for defendant): That is objected to. The Court: I think I will sustain it. I do not think that is an issue, is it? Mr. Johnston (counsel for plaintiff): I don't think it is, because I think if they refused - The Court: The letter of August 26th - Mr. Johnston: Was a complete refusal. The Court: - closed the transaction, the transaction closed on that date as I understand it. Mr. Johnston: I merely wanted to show that we had the sugar, that additional sugar came in after that. Mr. Coolke: I object to his offer in the presence of the jury, your Honor. The Court: Objection sustained. * * * Mr. Johnston: I offer to prove by this witness that further sugar was received by the Novak Grocery Company after the period of August, 1920, which sugar could have been delivered to George Hammussen Company under the contract, Plaintiff's Exhibit 1. Mr. Coolke: I object to it, your Honor, as incompetent, irrelevant and immaterial. The Court: I will sustain your objection. Mr. Coolke: The form of the offer." The first offer was clearly improper and insufficient. Instead of offering to prove facts sufficient to make out a prima facie showing, the question, in effect, merely calls for the opinion of the witness. As to the second offer, the defendant contends that the offer was improper and insufficient and that the court did not err in sustaining the

objection to the same, for the following reasons: First, the offer failed to state the kind of sugar received by the Nevak Company; second, it failed to state whether the sugar was received from Gerola or someone else; third, that if the sugar was received by the Nevak Company after the period of August, 1920, the defendant, under the contract, was not obligated to receive the same; fourth, the proof offered did not contain specific facts sufficient to make out a prima facie showing that the plaintiff was ready and able to deliver further sugar, under the contract, after August 20, 1920, and, fifth, that it merely called for a conclusion of the witness as to whether, or not, the sugar received could have been delivered to George Rasmussen Company under the contract. After a careful consideration of the question, we have reached the conclusion that the offer is justly subject to the criticisms made by the defendant. It is conceded in this case that there is an absence of proof that the plaintiff was ready, able and willing to deliver sugar to the defendant, under its contract, after August 20, 1920, and we think it would be an exceedingly dangerous precedent to sustain the plaintiff's instant contention.

After a careful consideration of the question involved in the present contention of the defendant, we have reached the conclusion that under the record in this case, and the contract, the plaintiff's damages should be limited to the 1,150 bags that were actually tendered.

Accordingly, if within ten days plaintiff files in this court a remittitur of \$12,089.64, the judgment against defendant will be affirmed for \$16,356.57; otherwise it will be reversed and the cause remanded to the Circuit Court of Cook County for another trial.

AFFIRMED FOR \$16,356.57 ON REMITTITUR:
OTHERWISE REVERSED AND REMANDED.

Barnes, F. J., and Gridley, J., concur.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the American Friends Service Committee in the Philippines. It is therefore requested that the Commission be kept advised of any developments in this regard.

The following information was obtained from the records of the Department of State:

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DAVIS ELLER for the Use of
Arthur H. Frashelm,
Defendant in Error,

vs.

CHICAGO CITY & TRUST COMPANY,
a Corporation, Garnishee,
Plaintiff in Error.

BRANCH TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks the reversal of a judgment for \$2407.86 entered against it as garnishee, upon striking its answer for insufficiency.

This case has previously been in this court (241 Ill. App. 323). The judgment then entered was against the garnishee for its failure to open a safety deposit box, as theretofore ordered. It stated in the opinion as grounds for reversal that:

"There is no evidence in the record to show that the garnishee had any property in its possession belonging to the defendant, because all that appears is that the defendant had rented a safety deposit box from the garnishee, but there is no evidence to show that the defendant had any property in the box at the time in question, and before this could be made to appear the box would have to be opened,"

and that the question of the authority of the court to order the garnishee to open the box and to punish it for contempt for not doing so was not properly before the reviewing court, although in other jurisdictions it was held that a garnishee might be compelled to open a safety deposit box.

Upon the present review respective counsel again argue this question, but the record does not present this question. After the judgment had been reversed and the cause remanded on the prior appeal, the following proceedings were had:

August 27, 1926, plaintiff moved that the answer of the garnishee be stricken. It should be noted that before the first

10. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of Nevada:

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judgment repeated motions had been made to strike the garnishee's answer or portions thereof, all of which had been denied, the court holding that the answer was sufficient. September 18, 1936, a rule was entered on the garnishee to open the safety deposit box rented by the garnishee company to Davis Miller and ruling the garnishee to answer in ten days as to the contents of the box. This order was substantially the same order which was the basis of the first judgment, which was reversed by this court for the reasons above stated. November 20, 1936, by agreement it was ordered that the time for the garnishee to open the box and answer the rule of September 18th was extended to December 13th. December 18th, apparently without notice, an order was entered reciting that the cause came on for further proceedings upon the regular trial call, that the motion to strike the answer of the garnishee for insufficiency was sustained and upon the further motion of the plaintiff final judgment was entered against the garnishee by default for want of an answer. Subsequently, within the term, the garnishee moved that this order be vacated and set aside, which motion was overruled.

The only question now before us is the validity of this last judgment, which raises the question as to the sufficiency of the answer of the garnishee. This answer had already been sustained by the trial court and no reason is now presented in the briefs as to why it was stricken on December 18th. It is not in any way whatever indicated in what particulars the answer is insufficient, and an examination of it fails to disclose any failure therein which would justify the court in ordering it stricken from the files. It therefore follows that the judgment order was erroneously entered.

The record shows that the answer was stricken for insufficiency. This raises a question of law, in which case the

answer is properly a part of the record and it is not necessary to preserve the same by a bill of exceptions. Simmons v. Cox, 107 Ill. 431; Mountain Head Drain Dist. v. Wright, 232 Ill. 404; Boocock v. Lott, 310 Ill. App. 402.

Counsel for the garnishee criticizes the form of the judgment which reads in favor of Davis Miller, defendant, for use of Arthur Bramheim, plaintiff. By the Municipal Court act, Cahill's Statutes, ch. 37, para. 436, it is provided that in garnishment proceedings the party for whose use the garnishment proceedings are instituted shall be designated plaintiff.

For the reason indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett and O'Connor, JJ., concur.

33429

ANNA MALINOWSKI,

Appellee.

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,

Appellant.

25-11-5134
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

In an action to recover on an accident insurance policy issued by the defendant to her husband, Anton Malinowski, plaintiff as the beneficiary had judgment for \$5400.00, upon a verdict, from which defendant appeals.

The policy contained a provision that "this insurance shall not cover suicide" and defendant asserts that the evidence fails to show that the deceased came to his death purely through accident, but that he was a suicide.

Anton Malinowski conducted a grocery store and for some time before his death he attended to business regularly, waited on the customers, making change, buying and selling. Morris Pollyea, a salesman for a pie company, had been selling to him for about a year and had seen him almost daily when he delivered pies to the store. On the morning of January 25, 1926, Pollyea entered the store, exchanged greetings with Malinowski, who was doing his usual work, and took his order for pies amounting to \$4.13. Plaintiff (the wife of the deceased) was in the store at the time and was told by her husband to go into the kitchen for some empty pie plates to give to Pollyea. Pollyea testified that Malinowski handed him a five dollar bill in payment for the pies but Pollyea did not have the change and handed the bill back to Malinowski, who took the bill and went back of the counter to a cash drawer to make

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change. As he opened the cash drawer Pollyea, who was at the opposite side of the counter, heard a shot and Malinowski fell to the floor. A German Lueger automatic pistol was usually kept in the cash drawer. Pollyea said that he could see the drawer as it was pulled open and did not see Malinowski have anything in his hand except the five dollar bill. After the shot Pollyea went behind the counter and saw Malinowski on the floor and the pistol nearby. Mrs. Malinowski heard the shot when she was by the doorway to the kitchen and ran back into the store and saw her husband lying on the floor.

From this bare narrative we have no difficulty in concluding that the jury could properly find that the shooting was caused by the accidental discharge of the pistol; the reasonable explanation is that opening the drawer engaged the trigger, causing the shot. There was no unusual occurrence which would suggest suicide or any stress or emergency that would prompt Malinowski to take his own life. All of the circumstances point to an accidental death.

The policy also provides that it shall not cover "death caused wholly or partly by ** mental infirmity," and that "all insurance under this policy shall be suspended if the insured ** shall become ** insane." Records were introduced showing that Malinowski had previously been adjudged insane, and it is argued that insanity having been established, it is presumed to continue until the contrary is shown. Malinowski had been committed to the State hospital for the insane at Dunning September 11, 1926; he was classified as an "alcoholic psychoses." The Registrar at Dunning testified that a man committed to the institution is paroled for ninety days after his condition shows improvement, and if at the expiration of that period the patient has not been returned to the institution he is discharged.

The Dunning records show that Malinowski was paroled on October 10, 1925, after having been at the hospital about a month and that he was discharged January 10, 1926. The records also show that he reported to the clinic four times after his parole and before his discharge.

Whether a person is insane is a question of fact. The jury could reasonably conclude that when Malinowski was kept from alcohol for a period of a month or so his mental trouble ceased and that at the time of his death he was not insane.

The defendant introduced in evidence the verdict of the coroner's jury which, it is argued, tended to show that the insured came to his death by suicide. Such verdict was not admissible. Whatever may have been the prior rule in this state, it is now established that coroners' verdicts are inadmissible to prove any fact in controversy in a civil action. Peoria Cordage Co. v. Industrial Board, 204 Ill. 90; Spiegel's N. E. Co. v. Industrial Commission, 283 Ill. 422; Cameron, Joyce & Co. v. Industrial Commission, 324 Ill. 497; see also Sec. 18 of the Coroners' Act, ch. 31, para. 19, Cahill's Stat. 1929. By parity of reasoning it would seem that the records from the Department of Police and the certificate from the Department of Health were not admissible touching the controverted point of suicide. Certainly, a written statement of a physician in connection with another policy is not admissible on this point. However, as the competency of such evidence is not argued in the briefs and the errors, if any, were to the advantage of the defendant, which the jury found liable, we do not pass upon their admissibility.

It is next argued that plaintiff failed to furnish defendant with the written notices and affirmative proof of loss, as required by the policy, as a condition precedent to recovery. The evidence shows that the delay in filing the claims in writing was caused by the defendant. Plaintiff's daughter, who was the deceased's step-daughter, 'phoned to the office of the defendant

company on the morning of the accident and told the person in charge of Malinowski's death and that the plaintiff wished to collect the insurance. She was told that some one would be sent out to see about the matter. Some weeks later a representative of the defendant called and told the plaintiff that he did not believe his company would pay the claim as it did not believe that the death was accidental. Agents of the defendant got the policy in question from plaintiff within a few days after Malinowski's death, but later claimed it was lost. There were other circumstances showing that defendant refused to pay, giving as its reason that Malinowski had come to his death by suicide. Under these circumstances it will not avail, as a defense, to assert that claim blanks were not filed within twenty days after the date of death, where the defendant prevented the filing of such claims within the time and also denied liability.

We find no reversible errors in the instructions.

By permission of the court plaintiff amended her statement of claim, alleging that defendant had wilfully and maliciously planned to defeat plaintiff in recovering the amount of the policy and claiming interest at six per cent from the date of Malinowski's death. The jury returned a verdict awarding plaintiff "\$5,000 plus interest at rate of five per cent from January 25, 1924." Judgment on this verdict was entered for \$5750, which was subsequently vacated and judgment against defendant was entered for \$5482.55. While it is the proper practice for a jury to return a verdict in one sum which should include any interest allowed, yet where the date is given from which interest is to be computed, it is not error for the court to compute the interest and enter judgment for the proper amount. In the present case the court reduced the judgment, allowing interest from the date of the death - January 25, 1925 - to the date

of the commencement of the suit. The defendant has no reasonable ground to complain of this reduction.

The verdict of the jury did substantial justice and we find no errors of sufficient importance to compel a reversal.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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CHARLES J. YOUNG and ROBERT C. BECKER,
 Copartners, Doing Business Under the
 Name and Style of YOUNG & BECKER CO.,
 Appellees,

vs.

N. O. STEIN & COMPANY, an Illinois
 Corporation,
 Appellant.

APPEAL FROM MUNICIPAL
 COURT OF CHICAGO.

MR. PRESIDING JUSTICE ROSENWALD

DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$1757.61 entered after a trial by the court upon a stipulation of facts.

It is conceded that there was due from defendant to plaintiffs \$14,000, but defendant sent its check for \$12,300 under circumstances which, it claims, amounted to an accord and satisfaction. The facts do not support this defense.

The parties stipulated that there was due plaintiffs from defendant \$14,000, which was the "fair, reasonable value of such compensation for services" in connection with certain loans. May 29, 1928, defendant sent its check for \$12,300 in payment of plaintiffs' claim, stating in the accompanying letter that they had deducted \$1700 by virtue of a prior transaction in which it was claimed that defendant had paid plaintiffs \$1700 by mistake. The letter concluded:

"I believe you will readily see that we should not have issued this check until we had consulted with them, and we are therefore endeavoring to put the matter in the same position that it was before the check for \$1700.00 had been issued.

"We trust you will co-operate with us in our endeavor to carry out this agreement in the way it was originally intended to be carried out."

It should be mentioned that the defence of accord and satisfaction in the affidavit of merits was filed by defendant one week after the date of the judgment hunc pro tunc as of the date

[illegible]

of the trial.

To constitute an accord and satisfaction there must be an honest dispute between the parties, a tender with the explicit understanding of both parties that it was in full payment of all demands, and an acceptance by the creditor. Obermeyer v. Wisconsin Dairy Farms Co., 199 Ill. App. 333; Lang v. Lane, 83 Ill. App. 343; Hingville Preserving Co. v. Frank, 87 Ill. App. 326; South Side Coal Co. v. Gross, 137 Ill. App. 315; Snow v. Orenheimer, 220 Ill. 106; American Forwarding & Express Co. v. Lindsay Chair Co., 129 Ill. App. 543; and many other cases. In the instant case that defendant owed \$14,000 for services was not disputed and the letter enclosing the check for less did not purport to be in full payment of all demands. It was simply a suggestion that what was claimed to be a mistake in another and prior transaction should be corrected in the later transaction. This does not amount to an accord and satisfaction.

Furthermore, examination of the stipulation of facts shows that the \$1700 previously paid by defendant to plaintiffs was not through mistake. The prior transaction arose in the early part of 1927, and on June 14th of that year plaintiffs wrote requesting the remittance of \$1700 for commissions and services therein. Numerous letters passed between the parties during the summer and fall of 1927, indicating that there existed a long idle dispute with respect to the liability of defendant to plaintiffs for \$1700. September 27th the matter was finally concluded by defendant sending its check to plaintiffs for \$1700, the amount in dispute, which check was received and cashed by plaintiffs. November 22nd defendant wrote plaintiffs, claiming that its principal had refused to allow defendant to charge this amount to his account. Plaintiffs promptly replied, denying the right of defendant to charge the \$1700 to their account. There the matter rested until the later transactions

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occurred, when defendant in its letter of May 29, 1928, enclosed its check for \$12,500 in payment of plaintiffs' admitted claim of \$14,000. It also appears from the stipulation that defendant had employed plaintiffs to render the services in the prior transaction by which the \$1700 was earned, and that the services were rendered and that a reasonable compensation for the same was \$1700.

Under these circumstances the payment in the prior transaction to plaintiffs was not the result of any mistake and defendant was not entitled to deduct the amount of this from the amount due for later services in other transactions.

The judgment was proper and is affirmed.

AFFIRMED.

Ketchett and O'Connor, JJ., concur.

10004

CATHERINE STUKEL, a minor, who sues
by Stephen Stukel, her Father and
Next Friend,

Defendant in Error,

vs.

LEO EY KLOCHNER,

Plaintiff in Error.

25-11-614
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURNELY
DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error asks the reversal of an adverse judgment of \$2500 entered upon the verdict of a jury in the trial of an action wherein Catherine Stukel (hereinafter called plaintiff) sought damages for injuries received by her when she was struck by defendant's automobile.

The accident happened October 11, 1928, at about eight o'clock in the evening, when it was dark, in Cicero at the intersection of 25th street, which runs east and west, and 57th court, which runs north and south, as defendant was driving his automobile west on 25th street. Plaintiff, fourteen years and three months of age, was walking with her mother west on the south side of 25th street; their destination was 56th court. When they came to the southwest corner of 25th street and 57th court they were uncertain as to the north and south street; they saw a street sign on the northwest corner on which plaintiff could read the word "Court" but could not tell what court it was. She testifies that for the purpose of reading the sign she crossed 25th street from south to north and when within a few feet of the north curb she stopped and looked at the sign. She remembers that she just saw the word "Court" when she was struck and became unconscious. She testified that before she crossed the street she looked but

THE COURT, after reading the evidence, said:

"I find that the defendant is guilty of the crime charged."

"I find that the defendant is guilty of the crime charged."

"I find that the defendant is guilty of the crime charged."

The court then proceeded to read the verdict and sentence. The defendant was found guilty of the crime charged and was sentenced to the state prison for a term of years. The court then adjourned the case.

did not see any car coming west. Plaintiff is the only witness to testify that she was standing still when struck by defendant's automobile.

Defendant testified that, as he was driving west in about the center of 25th street, at between 15 and 25 miles an hour, he saw plaintiff crossing the street going north; that when she arrived about four feet from the north curb she turned around and walked back; that he tried to avoid her by making a short turn to the left and applied his brakes; that the rear of his car skidded and swung around and his rear fender struck her.

Supporting his testimony is that of the witness Meyer who was riding with defendant. He testified that the point in 25th street where plaintiff started to retrace her steps southward was north of the pathway of defendant's car, which was at this time going at about 15 or 20 miles an hour.

The only difference between the respective stories is whether just before plaintiff was struck she was standing in the street some feet from the north curb, or had she turned and started to walk south. In either case it is very doubtful whether plaintiff was free from contributory negligence. According to plaintiff's version she was going north intending to cross the street, and it is a reasonable presumption that if she had done so and not stopped in the street she would not have been struck. On the contrary, she unexpectedly, so far as defendant was concerned, stopped in or near the pathway of the oncoming automobile.

We are asked to reverse the judgment on the ground that the judgment is manifestly against the weight of the evidence. Where a jury has been properly instructed and no prejudicial errors have occurred upon the trial, we are reluctant to disturb the judgment. In the instant case, we are persuaded that the verdict was the result of errors with respect to the instructions.

By instruction 7 given at plaintiff's request the jury was instructed that it is the law in Illinois that "the degree of care which the plaintiff was bound to use was that which a reasonable person of her age under similar circumstances should exercise, taking into consideration the age, capacity and discretion of the plaintiff to avoid danger." Plaintiff was more than fourteen years of age. In Hankaliunas v. C. & W. L. B. Co., 318 Ill. 142, it was held that, when a child has attained the age of fourteen years there is no reason to excuse him from the same degree of care for his own safety as is required of an adult, his intelligence and experience being considered. Under the circumstances this instruction should have been refused.

Defendant's refused instruction 5 is an application of defendant's theory of the facts relative to contributory negligence on the part of plaintiff. Such instruction is usually given and should have been given in the present case. A party is entitled to instructions which cover his theory of the case. Thomas v. The Chicago Packaging Co., 307 Ill. 134; Carlin v. Grand Trunk Ry. Co., 243 Ill. 64; U. C. Ry. Co. v. O'Donnell, 308 Ill. 287; Blust v. Langas, 1st Dist. Ill. App. Ct., number 32036.

Instruction 6 tendered by defendant was refused. This was the ordinary instruction defining contributory negligence and should have been given. Kehr v. Snow & Palmer Co., 222 Ill. App. 403.

Instruction 4 tendered by defendant was refused. It was the well known instruction that the plaintiff is required to establish her case by a preponderance of the evidence. The refusal to give this instruction was held reversible error in Chicago Union Traction Co. v. Kea, 212 Ill. 9.

Defendant also asked for instruction 3, which was refused. This embodied the theory of defendant's case on the question of defendant's negligence. There was evidence tending to show

that defendant was not guilty of the negligence charged and the instruction should have been given.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Ketchett and O'Connor, JJ., concur.

39413

CARL D. KINSEY,
Appellant,

vs.

W. L. ZIMMERMAN, ALBERT
K. BAKE and H. W. ZIMMERMAN,
Co-partners as ZIMMERMAN,
BAKE & ZIMMERMAN,
Appellees.

APPEAL FROM THE MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In the trial court plaintiff Kinsey sued Zimmerman and others, copartners, for rent and confessed judgment under power to do so contained in a written lease. The judgment was on motion of defendants set aside, the affidavit of merits averring as a defense a constructive eviction from the premises. There was a trial by jury and a verdict for defendants, upon which the court entered judgment.

Plaintiff appealed to this court and the judgment was reversed. Kinsey vs. Zimmerman, 241 Ill. App. 625. The case was before the third division, which held as a matter of law that the defects, which there was evidence tending to show existed in the premises, were insufficient to warrant submitting the case to the jury on the question of constructive eviction. The cause was therefore remanded, with directions to affirm the judgment entered by confession.

The Supreme court granted a writ of certiorari and reversed our judgment, holding that under the evidence the question of whether there was a constructive eviction was for the jury. The cause was remanded to this court with directions to consider other assignments of error and either affirm or reverse and remand. Kinsey v. Zimmerman, 329 Ill. 75.

This court in its former opinion said:

"Plaintiff introduced evidence in rebuttal tending to show that upon being notified that the pipe was leaking he endeavored to repair it and afterwards he had a new pipe installed. He also offered evidence to the effect that the pipe had not leaked after the new one had been installed and that the defendants vacated the premises not because of the fact that water dripped from the pipe, but because they were anxious to move into a new building where other architects were going; that the defendants had several months before they vacated the premises talked with plaintiff about subletting the space occupied by them. This evidence was erroneously excluded by the court."

The opinion of the Supreme court does not consider the question of whether this court erred in its finding that material evidence offered by plaintiff was erroneously excluded. Manifestly such a finding would compel a reversal of the judgment.

On the trial, before the taking of evidence began, attorney for plaintiff insisted that under the pleadings the burden of proof was on the defendants and that evidence in their behalf should be first offered. The court, however, overruled this contention and held that plaintiff must first establish a prima facie case, whereupon plaintiff offered the lease in evidence, and proved by Mr. Sivoris, agent of the building, that the rent due under the terms of the lease for the months from February to August, 1923, inclusive, was not paid, and tested. Defendants then offered evidence in support of their contention that there was a constructive eviction by the landlord. Their evidence shows without contradiction that they paid the rent for the month of January, 1923, and vacated the premises on the 13th of the same month.

Plaintiffs then called the agent as a witness, who testified that his office was on the 10th floor of that building, directly under the space occupied by defendants, and that he had a conversation with one of the defendants in regard to the subletting of the premises and other things after the work of putting in the pipe was done in December. He was asked, "What did he say about the matter?" to which defendants made a general objection, whereupon attorney for plaintiff stated:

"We are defending against their claim and one of our defenses is that they were seeking to break this lease, and that has been a very important element in cases that have been cited."

The following then took place:

"The Court: That part has not been introduced in any part of this case up to this minute.

(Atty. for def'ts) Mr. Klein: It is too late to do it on rebuttal.

(Atty. for plaintiff) Mr. Bentley: This is not rebuttal.

The Court: What do you call it?

Mr. Bentley: They are here claiming an eviction. The burden is on them to show that there was an eviction. I want to show and I offer to show by this witness that they were advertising that space for rent in August; that they talked with him in August.

Mr. Klein: I object to any of these statements in the presence of the jury. That is not proper.

The Court: Yes, it is not proper in the presence of the jury.

Mr. Klein: It is done solely for a purpose.

The Court: Will you gentlemen of the jury retire to your room for a few moments?"

Whereupon the following proceedings were had without the presence of the jury:

Mr. Bentley: I offer to prove by this witness that the defendants in this case sought to subrent this space in July and August of 1922, before writing this letter of complaint; that they at that time were in negotiation or closing for space that they now occupy, providing they could get rid of this lease.

The Court: Are you going to show that by this witness?

Mr. Bentley: I will show part of that by this witness. I will show by this witness that they sought to have this place subrented. They came to him about subrenting it or canceling that lease.

The Court: Certainly that is not rebuttal. However else you might get it in, it is not rebuttal.

Mr. Bentley: I am not calling this rebuttal.

The Court: But we must call it that.

Mr. Bentley: I am calling this a defense against their claim against us of a constructive eviction.

The Court: No, you are claiming against them for some money and they are defending because you ousted them by some alleged act of yours."

Plaintiff having taken an exception, attorney for defendants stated:

"I want to make my record. I want to get my objection in there to counsel's offer as being no part at this time of rebuttal and not competent, relevant or material."

The court then said: "The court has held it is not rebuttal."

The jury was then recalled and attorney for plaintiff asked the witness if he had a conversation with Mr. Saxe, one of the defendants, with reference to canceling the lease or taking the premises and releasing him. There was again a general objection by defendants' attorney, which was sustained by the court, and the attorney for defendants stated:

"I object to this line of examination at this time as absolutely improper.

The Court: Yes.

Mr. Bentley: I want to ask it for protecting purposes.

The Court: No, you did all your protecting outside the presence of the jury.

Mr. Bentley: I thought I had to ask the question. Very well, I will go to another subject then."

The burden of proof was of course upon the defendants to establish the affirmative defense which they had interposed by the pleading. There was no attempt to deny the execution of the lease nor the amount of rent which was due and unpaid, unless there was a constructive eviction as alleged. Obviously, plaintiff could not properly have introduced his evidence tending to overcome the affirmative defense until the evidence for defendants was submitted. The ruling which denied plaintiff his right to offer evidence tending to show that the defense of a constructive eviction was not made in good faith but for another reason, was equivalent to denying plaintiff the right to present his case to the jury. It was reversible error to exclude it and especially upon a general objection.

Marshall v. Davies, 78 N. Y. 414; 33 Cyc. 1571; 30 Corp. Juris., sec. 990, p. 264; Ainsay vs. Zimmerman, 241 Ill. App. 625.

The court further erred in admitting in evidence a carbon copy of a supposed letter of defendants to plaintiff, dated October 23, 1922, which appears in evidence as Defendants' Exhibit No. 3. Objection was specifically made by plaintiff that there was no proof that the letter had ever been mailed. It is not written in response to any other letter and is purely self-serving.

It should have been excluded.

We think, too, there is a basis for the contention of plaintiff that the court erred in commenting upon the weight of the evidence in the presence of the jury, but as the errors which we have already pointed out demand a reversal and, under the ruling of the Supreme court, another trial, it will be unnecessary to discuss these assignments in detail.

For the errors already indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

33527

ALEXANDER WEISS et al.,
Appellees,

vs.

HARRY E. ENGLESTEIN et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

314⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs are real estate brokers. The defendants are the owners of a parcel of real estate situated at the southeast corner of 47th street and Grand boulevard in Chicago. On January 29, 1926, defendants leased this property for a term of twenty-five years to I. J. Faggen and Charles Galewski at a rental of \$30,000 a year, with a percentage interest in the excess rental receipts of a ballroom to be conducted on the premises. Plaintiffs claim commissions due to them as brokers for procuring these leasees.

The issues were submitted to a jury which returned a verdict for plaintiffs in the sum of \$13,500, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

The main point urged for reversal is that the court erred in the admission and exclusion of evidence. It is also argued that there was error in instructing the jury and in denying the motion of defendants for a new trial.

The evidence tends to show that in the early part of 1926 the Associated Ballrooms, Inc., a New York corporation, conducted a ballroom for colored people in New York city. The stockholders of this corporation were I. J. Faggen, Charles Galewski, Moe Gale and Judge Prince.

I. J. Faggen, in behalf of the corporation, inserted an advertisement in a Chicago newspaper, announcing a desire to

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The diagram shows a mechanical system with a vertical shaft and a horizontal beam. A weight is suspended from the beam. A curved line represents a path or a spring mechanism. The system is labeled with 'PULLEY', 'BEAM', 'WEIGHT', and 'CURVED LINE'. The diagram is a schematic representation of a mechanical system.

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purchase or lease a plot of ground in the heart of the colored district of Chicago for an amusement project. Plaintiff Schmidt answered the advertisement, correspondence followed, and on June 8th I. J. Faggen and Galewski came to Chicago and conferred about the project with plaintiff Schmidt and a Mr. Tyrrell, an employee of one of the plaintiffs, McKey & Peague.

Galewski having returned to New York, I. J. Faggen (so Tyrrell and Schmidt testified, over defendants' objection) said that he had notified Galewski and his own brother, John J. Faggen, to meet him at the station in New York city upon his return; further that if he, I. J. Faggen, did not return to Chicago his brother, John J. Faggen, would come in his place and that "John J. Faggen was supposed to have active charge of the Chicago end of it." A few weeks later John J. Faggen came to Chicago and was introduced to plaintiff Schmidt, who testified (again over the objection of defendants) that John J. said "his brother was very busy and wasn't able to come to Chicago, and he came to Chicago in order to conclude this deal and try to get some action on it. And Mr. Jawer too said that they expected that we would be farther along with it by this time. So they were here to either make or break the deal, and his brother sent him to Chicago in order to look at this location at 47th and Wabash, in order to see that the spot was suitable for him, because he was supposed to be in active charge of the Chicago end of it." Wabash avenue and 47th street was another location which was considered.

The witness Tyrrell also testified over objection that John J. Faggen said at this time "he was going to handle the Chicago ballroom for the New York syndicate."

Evidence was also introduced tending to show that the real estate office of Alfred Hamburger, Inc., of Chicago, also

responded to the advertisement which appeared in the Chicago paper; that letters and telegrams passed between that firm and the Associated Ballrooms, Inc., of New York. Mr. Schwartz of Hamburger's office testified that he met Mr. Galewski and I. J. Faggen at the time of their visit to Chicago on this business; that when I. J. Faggen left "he said he would take this up with his brother, board and corporation, and they would decide upon it and let me know further."

A letter from John J. Faggen to Arthur Hamburger & Co., dated July 8, 1926, was received in evidence, apparently without objection, in which he states:

"I am to assume active charge of operations in Chicago and therefore resume negotiations started by my brother, Mr. I. J. Faggen."

and states that when certain preliminary questions had been answered he would come to Chicago "to conclude." Mr. Schwartz testified in rebuttal, over the objection of defendants, that when John J. Faggen came to Chicago "he said that he represented his brother and his organization and that he was to take active charge here in Chicago of this proposition of this ballroom, this colored ballroom."

Defendants contend that all this testimony as to oral conversations with I. J. Faggen and with John J. Faggen was incompetent and prejudicial; that the same were hearsay and were inadmissible further for the reason that the alleged fact of the agency of John J. Faggen could not be proved by the unsworn statements of his brother, the alleged agent, who did not testify.

Cases announcing the general rule are cited, including Marshall v. Chicago & Great Western Ry. Co., 43 Ill. 475; Grubb v. Milan, 249 Ill. 456.

The testimony tends to show that on September 7, 1926, plaintiffs presented the matter to defendants, gave to defendants the names of I. J. Faggen and Galewski as their clients,

and that defendants at that time promised that they, defendants, would protect plaintiffs in the transaction insofar as their commissions were concerned.

I. J. Faggen testified, admitting the visit to Chicago and his interest in the advertisement, but denying that he had said to anyone that Mr. Galowski or John J. Faggen would meet him upon his return to New York. He stated that he never mentioned the name of John J. Faggen to anyone before leaving Chicago, that he would return shortly, that otherwise his brother John J. Faggen would return to Chicago and take the matter up for him, nor that John J. Faggen would be in charge of the operation of the ballroom if it were established in Chicago; that upon the receipt of a telegram of June 30, 1926, from one Julius A. Kahn stating that a building site would cost several hundred thousand and asking if he could put up the first and last years' rent, he and Galowski decided that "it was quite impossible to go through with the thing;" that he then turned over all of the correspondence to his brother, John J. Faggen, and but did not tell him, John J., to represent him (I.J.) in the matter.

An examination of the record discloses that both parties to the suit introduced evidence of alleged conversations taking place between the prospective customers and plaintiffs both before and after plaintiffs were employed as agents of defendants on September 7th, and it is also perfectly apparent that the issues could not have been presented to the jury in any other way. It is of course true, as defendants suggest, that they were not bound by these conversations, and the conversations were not introduced upon the theory that the same were binding upon either of the parties. They were not admissible for that purpose. There was no claim that I. J. Faggen, John J. Faggen or Galowski were the agents of defendants or that defendants were bound by

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anything that they may have said. The question for the determination of the jury under the issues was whether plaintiffs procured I. J. Faggen and Galowski as lessees, and this would necessarily require the introduction of evidence showing all the conversations and circumstances which led up to the execution of the lease. The fact that I. J. Faggen came to Chicago and met plaintiffs and the further fact that after he returned John J. Faggen came to Chicago and met plaintiffs were admissible as facts, but these facts could not be understood unless the jury was informed as to what was actually said at the time of these contacts. It can hardly be contended that the authorization of John J. Faggen to act as the agent of I. J. Faggen could not be proved unless some one of the defendants was present at the time he was authorized, nor is the hearsay rule applicable to such a situation. Proof of the agency of one not a party to a suit may be shown by conversations outside the presence of defendants. It was so held in Rice v. International, 185 Ill. 482, affirming 86 Ill. App. 136, which is cited in plaintiffs' brief but not discussed by defendants. Conversations to which defendants objected on the trial and of which they now complain were admissible and were not hearsay but original evidence; and there being evidence in the record tending to show that John J. Faggen was the agent of I. J. Faggen, further evidence as to conversations with John J. Faggen was admissible, not for the purpose of showing that everything said was actually true but for the purpose of showing that these statements were in fact made. Wigmore on Evidence, vol. 3, sects. 1746-92.

Defendants complain that on objections of plaintiffs the court excluded a written contract between Abram Jawer, Samuel Jawer, Nathan Faggen, Louis A. Faggen and John J. Faggen, in and by which these parties agreed to enter into the business of forming a corporation to lease the premises for a public dancehall in

Chicago. This contract purported to have been made on July 24, 1936. John J. Faggen, as already stated, did not testify, but Samuel Jawer, a friend of the family, came from Philadelphia and gave testimony with reference to the execution of it. It does not purport to be between any of the parties, and there was no preliminary proof which would make it competent. The court did not err in excluding it.

It is next contended that the court erred in giving instruction No. 2 at the request of plaintiffs. The instruction is as follows:

"The court instructs the jury that if you believe from the evidence in this case that the defendants employed the plaintiffs as their agents to negotiate for a lease on the defendants' land and buildings then erected, or to be erected, and the plaintiffs undertook said employment and introduced and brought together the lessees and the defendants, then and in such an event the plaintiffs are entitled to compensation for their services regardless of the fact that the defendants concluded the negotiations for a lease."

It is urged that the instruction was erroneous on the authority of Sheppard v. Cade, 227 Ill. App. 110, and Murawaka v. Bonger, 219 Ill. App. 241, but we do not find anything in these cases inconsistent with this instruction. Substantially similar instructions were approved in Wilson v. Mason, 158 Ill. 304; Hafner v. Herron, 165 Ill. 242; Henry v. Stewart, 188 Ill. 453, and in Dean v. Archer, 103 Ill. App. 455.

It is unnecessary to discuss at great length the point urged in defendants' behalf that the evidence fails to show that plaintiffs were the procuring cause in the making of this lease. It is true, as already stated, that I. J. Faggen testified that upon receiving the telegram of June 30th he and Galewski decided that it was quite impossible to go through with the matter and decided that they would drop it. I. J. Faggen said that he then turned over all the correspondence to his brother, John J., but that he never asked his brother to represent him in any way. He admitted he received a

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telegram from plaintiff Schmidt on September 7th, stating that negotiations had started for the lease, explaining the plans in detail and asking him to get in touch with his brother and to wire if he approved. He said that he turned this telegram over to his secretary with instructions to mail it to his brother, J. J. He does not claim, and there is no evidence tending to show, that he ever notified the plaintiffs of a decision to abandon the negotiations. That he had not abandoned the project is apparent from a telegram sent by him to Julius Kahn on June 30th as follows:

"What day next week can you or Mr. Weiss come to New York stop we will reserve room for you at Pennsylvania Hotel or elsewhere if desired stop be prepared with figures your best proposition stop we will do likewise stop your trip to be at our expense wire immediately"

On the following day he wired as follows:

"We figure building to cost one hundred twenty five thousand stop building of garage type construction one story no basement little better than four walls and roof what makes you think cost will be so excessive stop your own proposition was one years rent why change now wire"

I. J. Faggen further in behalf of defendants testified that in September or October Mr. Galewski in New York called him on the 'phone and told him that he had been playing bridge with a Mr. Sobel, an intimate friend, and that Sobel turned over to him a letter from a cousin in Chicago named Henschel, a salesman for Albert Pick & Company; that Galewski then told him that defendants were about to put up a ballroom, theatre, etc., and advised him to call Chicago immediately and locate defendant Harry Englestein, which he did about an hour thereafter; he also called him on other occasions. The witness further said that Mr. Englestein then went to New York and conducted the negotiations which resulted in the execution of the lease. J. J. Faggen, who, if the whole truth was to be brought out, was perhaps the most important witness, was not produced nor his absence accounted for, although other witnesses for defendants were procured from New York and also from Philadelphia. It is

apparent that the jury did not believe this evidence of I. J. Fagen and after considering all the testimony we are not persuaded that we ought to disagree with the jury. The evidence shows continuous negotiations by a letter, wire and conversations from the time of the first contact and establishes the right of plaintiff to recover.

The judgment is just and is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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38357

CHICAGO MUSICAL INSTRUMENT
COMPANY, a Corporation,
Appellant,

vs.

IVA CRAGAN,
Appellee.

7 614⁵
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a statement of claim against defendant as alleged guarantor of 31 promissory notes for the principal sum of \$25 each with interest. The alleged guarantees contain powers of attorney to confess judgment, and plaintiff procured such confession thereunder. This judgment was later, upon motion of defendant supported by her affidavits, set aside. There was a trial by the court upon the merits and a finding for the defendant, upon which the court entered judgment, to reverse which this appeal has been prosecuted.

The defense set up is that the signature of the defendant to the guaranty which appears on the back of each note was not intended to create a personal liability and did not in fact create such liability.

The maker of the notes was the Cragan School of Music, Incorporated, a corporation of Illinois, organized in 1925, of which defendant Iva Cragan was secretary and treasurer. The husband of defendant was the active manager of this corporation up to the time of his death on January 31, 1927. Prior to that time defendant had taken no active part in the management of the corporation. She was merely a teacher and musician. After the death of Mr. Cragan defendant became the active manager of the school conducted by the corporation. The corporation was heavily indebted to the plaintiff, and at a conference held at the office of defendant's attorney he advised the filing of a petition

THE UNIVERSITY OF
THE STATE OF NEW YORK
IN SENATE
January 14, 1914

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE

Presented to the Senate at the Session held at Albany, January 14, 1914.
ALBANY: JAMES B. LEE, STATE PRINTER, 1914.

The Commission on the Land Office was organized on January 1, 1913, and has since that time been engaged in a study of the various questions connected with the management of the State Lands.

The Commission has the honor to submit to the Senate its report on the progress of its work during the past year. It has the pleasure to announce that it has completed its study of the various questions connected with the management of the State Lands, and has prepared a report which it believes will be of great value to the State.

in bankruptcy. Mr. Berlin, a personal friend of defendant and representative of the plaintiff corporation, at that conference advised against the filing of such petition. The Cragun School was a customer of plaintiff, and that relationship continued up to the time it ceased to do business.

Mr. Berlin called defendant on the 'phone and asked if she would facilitate matters by making some notes. Several conferences followed, and defendant finally promised to execute the notes and on November 18, 1927, went to plaintiff's office where the notes and the guarantees here made on were executed.

The amount of the indebtedness of the Cragun School of Music was computed and the notes drawn up and submitted to defendant. She testifies that she asked, "How shall I sign this?" and one of the representatives of plaintiff said, "Iva Cragun," to which she responded, "No, I won't sign anything personally because they are not my debt. I will be glad to help the school in any other way I can, but I won't sign anything personally." She further says that they talked about it a little more and said, "Well, they are not made out for the school." She then said, "Well, we will fix that because I won't sign them that way." She was asked if she had a stamp with which the name of the corporation might be affixed. She replied she had not, whereupon it was stated that the name of the corporation could be typewritten on the face of the notes, which was in fact done.

Defendant's testimony is to the effect that the name of the corporation was typed as maker of the notes after she had written the words, "Iva Cragun, Secretary." The evidence for the plaintiff is to the effect that the name of the corporation was written first and that defendant signed her name as secretary thereafter. Defendant further says that after she finished the execution of the notes Mr. Barber, who represented plaintiff,

said, "Now you will have to sign it on the back;" that she asked, "What is this?" to which he replied, "That is just a form that we put on all our notes;" that defendant replied that she would sign just as on the other page; that he replied it was all right; that she thereupon signed the guaranty on the back of each note, writing "Iva Cragun, Secretary," and that after signing and before leaving the room she told the representatives of plaintiff, "Be sure to put Cragun School of Music on there," to which they replied, "Yes."

On the back of each note under a printed form of a guaranty is defendant's signature in the form, "Iva Cragun, Secretary," and above is a line upon which, however, nothing is written or typewritten.

Mr. Barber testifies that defendant said she did not want to sign the endorsement. He says, "I explained it to her that I did not think she needed to worry a great deal about these notes, because heretofore commissions in the school had more than covered the payments that were to be made and that these notes, if the school went along, the chances were that these notes would be paid by the commissions on the sale of instruments and that there was hardly anything for her to worry about if the school would run properly." He says that he gave the instruction to have the name of the corporation typewritten but did not take care of the actual details. He says, "I do not know why she put 'Secretary' on there," and that nothing was said by Mrs. Cragun as to "signing the same as I signed on the front."

Evidence was also given by a handwriting expert to the effect that in his opinion the defendant's name as secretary was signed after the name of the corporation had been typewritten.

The trial Judge, apparently, upon material points ac-

accepted the testimony of defendant as true, and we would not be justified in holding, under all the circumstances appearing in the record, that the finding is against the weight of the evidence.

Plaintiff contends, however, on the authority of Hately v. Pike, 162 Ill. 241, and other cases cited in that opinion, that the word "Secretary" is used merely as descriptive personas and that defendant is therefore personally liable on her guaranty. If the evidence of the defendant is accepted it is apparent that the execution of the guaranties upon the back of the notes was never in fact completed and that the assertion of liability of a guarantor against the defendant would amount to a fraud. Moreover, section 20 of the Negotiable Instrument law appears to be applicable. Smith-Hurd Ill. Rev. Stat. 1927, p. 1849. That section in substance provides that where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him as agent or as filling a representative character without disclosing his principal, does not exempt him from personal liability. The purpose of this enactment was to clear up the confusion theretofore introduced into the law by the failure of the courts to recognize mercantile usage. Brannan's Negotiable Instrument Law, Ann. 4th ed., p. 164.

The brief of the plaintiff seems to recognize this section of the statute as applicable but makes the point that there is no proof in the record of authority on the part of defendant to bind the corporation; and it is urged on the authority of City of Chicago v. Stein, 259 Ill. 409, and Independent Oil Men's Association v. Fort Dearborn Nat'l Bank, 311 Ill. 273, that as Secretary she was without authority to execute negotiable paper in behalf of the

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corporation and therefore did not bring herself within the exception.

It is not difficult to distinguish this case from those cited and relied on, since the record shows not only that defendant was the secretary and treasurer but that she was the manager and practically after the death of the husband in entire control of the business. Moreover, there are respectable authorities which, construing this section of the Negotiable Instrument act, hold that in the absence of proof to the contrary, the authority to execute negotiable paper is presumed, (Eisinger v. Murphy, 48 App. D. C. 476; 52 App. D. C. 197, 235 Fed. 931) and such was assumed to be the rule in Decowski v. Grabarski, 181 Ill. App. 279.

Under all the circumstances which appear in this case, the trial court was justified in finding that it was not the intention of the parties that defendant should be held personally liable as a guarantor. No rights of third parties have intervened, and substantial justice seems to compel the judgment rendered by the trial court. It will be affirmed.

AFFIRMED.

McSorely, P. J., and O'Connor, J., concur.

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254 I.A. 615

EDWARD M. MILLER, guardian of the
Estate of SAMUEL LEVITIA, a minor,
Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY et al.,
Defendants,

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by one of the defendants from a judgment for the sum of \$25,000 entered upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and in arrest of judgment having been overruled.

The amended declaration on which the case went to trial contained three counts. These alleged that defendants, Chicago & North Western Railway Company, Pennsylvania Railway Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, operated steam railways in the City of Chicago over parallel and adjacent tracks running in a northerly and southerly direction between certain public highways; that the railroad tracks of the defendants were elevated under an ordinance of the City of Chicago passed January 18, 1897, which was accepted by defendants on March 1, 1897; that said elevation ordinance provided:

"The embankments upon which said elevated tracks shall be carried between the intersecting streets, boulevards, or avenues shall be composed of sand, gravel, loam, clay, broken stone, or whatever else may compose the surplus material excavated from the subways, and from the foundation pits and trenches along the line of said work, and their side slopes shall be defined by the natural angle of repose of the material out of which the embankments are constructed; or such embankments shall be carried between retaining walls of stone or brick masonry, but when such retaining walls are not used, the right of way of said railway companies shall be enclosed with fences, or otherwise, in con-

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pliance with the present ordinance of the City of Chicago relating to the fencing of railway tracks."

The declaration further set up material sections of the fencing ordinance of the City of Chicago enacted on March 26, 1890, re-enacted in the Revised Municipal Code of the City of Chicago of 1905, and in the Revised Municipal Code of 1911, and again re-enacted by the City of Chicago on November 22, 1922; averred that defendants never constructed any fences; that in elevating the tracks under the ordinance of January 18, 1887, defendants constructed retaining walls of stone, especially upon and along the east side of the right of way, which they carelessly and negligently permitted and allowed at this place to fall into decay and to become and remain defective, broken down and covered up by the natural angle of repose of said materials, and rivers passage, open places and holes to be and remain in the same, so that the embankment lay in a gradual slope, and furnished easy access to and from the tracks; that for a long time by reason of this condition persons, including children of tender years, were accustomed to go upon and play about the tracks and right of way of defendants; that defendants had notice of the defective condition of the wall and this custom of the children; that plaintiff's ward was a child eight years of age, and while in the exercise of ordinary care for one of his age, as a result of this carelessness and negligence, went upon the railroad tracks, and that there as a proximate result of such carelessness and negligence the train ran upon and against him.

In the third count plaintiff also charged liability by reason of "an Act Concerning Public Utilities," which provides:

"Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and the public, and as shall be in all respects adequate, efficient, just and reasonable."

is another factor in the way we think about the world.

1999

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1. The first part of the text discusses the importance of maintaining accurate records of all transactions, including sales, purchases, and expenses. It emphasizes that proper record-keeping is essential for determining the correct amount of tax liability.

To this declaration, the defendant Chicago & North Western Railway Company filed a plea of the general issue, and the other defendants filed the same plea, with a special plea of non-ownership, possession and operation.

At the close of all the evidence the court on motion of the defendants Pennsylvania Ry. Co. and Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., instructed the jury to return a verdict of not guilty as to them, and the cause was then submitted to the jury with the result heretofore stated.

There is little if any conflict in the evidence as to the material facts. The three Railway companies, the Chicago & North Western Ry. Co., and the other defendants, the latter two of which were associated companies of the Pennsylvania Railroad System, which we shall hereafter refer to as the Pennsylvania Railway Company, prior to January 15, 1897, occupied and operated over separate rights of way railroad tracks on the surface immediately adjacent to each other, extending north and south along and adjacent to Rockwell street in Chicago, and crossing Congress and VanBuren streets, Jackson boulevard and other streets, both to the north and south of the street named. Upon that date the City of Chicago adopted the ordinance set forth in the declaration, which required these companies "to respectively elevate the plane of certain of their railway tracks within the City of Chicago." In different paragraphs of the ordinance the locations where elevation was required and specifications therefor, including the location here involved, were set forth. Section 2 of the ordinance provided: "And each of said three companies shall construct its own proper part of such subway and its approaches." Paragraph 3 of section 3 provided: "All of said work shall be sent to the satisfaction of the Department of Public Works of said City, but at the expense of said railroad companies, respectively, as hereinbefore stated."

Said ordinance also provided that in case either of the Railway companies should determine before the elevation of their tracks to diminish the number of the same, then the dimensions of the subway to be constructed might be changed accordingly. Section 10 of the ordinance contained a provision that when either of the companies had prosecuted the work to be done by them "respectively" thereunder and such work could not be further conveniently prosecuted, then the third company should be required to immediately begin to prosecute its part of the work, the entire work of each company to be completed on December 31, 1898.

Section 12 of the ordinance provided in substance that when the railway tracks should be elevated according to the ordinance, and the work completed, it would be unlawful for any person, except employees, etc., in discharge of their duties, to enter upon the elevated structure at any point, and that any person violating the ordinance would be liable to a fine; that after the work was completed all provisions of ordinances of the City of Chicago relating to speed of trains, giving of signals, maintenance of gates, flagmen, switchmen, signals and signal towers, would cease to be applicable.

The companies, by separate documents, accepted the provisions of the ordinances within the time provided and agreed to comply therewith. The work was done, including the construction of retaining walls on both sides of the embankment under direction of an engineer representing the defendant companies, and the cost was pro rated between the defendant companies in proportion to the work done and materials furnished for their respective rights of way.

The two rights of way were immediately adjacent, that of the Chicago & North Western Railway Company being on the west and that of the Pennsylvania Co. on the east. The fencing ordinances of the City of Chicago, as heretofore set up, were offered and received in

evidence, and it appeared that on March 22, 1892, the defendant Chicago & North Western Railway Company, under the signature of its president, accepted an ordinance of the city to regulate the speed of railways, passed March 26, 1890. This ordinance provided that on failure to comply therewith "this permit may be revoked," and one of the specifications under this ordinance provided:

"Wherever and whenever any Railway company shall raise their tracks to a sufficient height to permit subways under street crossings then in that case the construction of said subways shall be held to be in lieu of fences of any kind along the line of the railway tracks so raised."

For several years prior to the happening of the accident out of which this suit arose, namely, September 2, 1926, the retaining wall on the Pennsylvania company side of the embankment created by the elevation of the tracks became out of repair by reason of several of the large coping stones forming the top of the wall falling out or otherwise becoming displaced. In the years prior to that time dirt had been deposited on the street immediately adjacent to this wall and extending on to the vacant lot to the east, thus raising the surface of the street and adjacent lot so that the height of the wall above the dirt deposited there was materially less than the height of the wall above the surface of the street when the wall was built. The space in the street had been used as a dump. At the places where the coping stones were absent dirt and ballast from the Pennsylvania tracks and embankment had fallen down and over the wall, making a continuous slope from the top of the embankment to the natural surface to the east, and boys were accustomed to climb up this embankment at these places and go upon the railroad tracks.

On September 2, 1926, plaintiff, a boy nine years of age, with other boys, walked upon the embankment on the Pennsylvania side of the same between Jackson boulevard and Van Buren street at

a place where the coping stone was absent. He went upon the track of the defendant Chicago & North Western Ry. Co., and climbed upon the cars of a freight train which was then moving in a southerly direction. He climbed up the side ladder of the car and came in contact with a steel girder, fell from the car, a wheel passed over his right leg above the ankle, and he received injuries necessitating the amputation of the leg a few inches above the knee.

The defendant Railway company has presented a brief of 23 points, many of which it will not be necessary to discuss in detail. Aside from some points which we will later notice, the position of defendant may be summarized in two contentions: (1) that the ordinances set up in the declaration and received in evidence are not valid and binding, and (2) that assuming the same to be valid and binding plaintiff is not entitled to recover under the averments of the declaration and the proof submitted.

In support of the first proposition, it is asserted that the fencing and elevation ordinances of the City of Chicago have been abrogated and the city deprived of power to either enact or enforce the same by reason of the enactment of the Public Utilities act of Illinois, effective January 1, 1914, and the act of 1921, in force July 1, 1921, and it is therefore urged that the court erred in submitting the case to the jury upon the theory that these ordinances were in effect at the time plaintiff was injured, September 2, 1926. In support of this contention the defendant Railway company cites Village of Atwood v. C. & N. W. Ry. Co., 316 Ill. 424, where an ordinance passed by the Village of Atwood on February 13, 1908, requiring a railroad company to station and maintain a Flagman at the intersection of a certain street within certain times each day, was held invalid in a suit brought by the city or village against the railroad company. It was held that

the village did not have such power because the "Act concerning Public Utilities," in force July 1, 1931, vested the power in the Illinois Commerce Commission.

Defendant also relies upon Northern Trust Co. v. Chicago Ry. Co., 318 Ill. 402; Sitt v. C.C.C. & St. L. Ry. Co., 324 Ill. 494, and other similar cases which follow the rule there announced.

Plaintiff contends, notwithstanding these decisions, that the passage of the Utilition act did not render invalid the particular ordinances of the City of Chicago known as the Fencing and Elevation ordinances, basing this contention on the case of Maskaliunas v. C. & W. L. R. R. Co., 318 Ill. 142.

In that case the plaintiff brought an action against the defendant Railway company, claiming damages on account of an injury which occurred September 29, 1931, near 105th street, Chicago. The plaintiff was 7 years, 10 months of age, and the declaration averred the negligence of the defendant Railroad company in its failure to comply with the fencing ordinances. There was a judgment for the plaintiff, which on appeal to the Appellate court was affirmed and a certificate of importance granted to the Supreme court, which in an opinion filed June 19, 1935, also affirmed the judgment. A rehearing was denied October 9, 1935. The Atwood case was decided April 24, 1935, almost two months prior to the decision in the Maskaliunas case, and the case of the Northern Trust Co. v. Chicago Ry. Co. was decided on October 29, 1935, just nineteen days after the petition for rehearing in the Maskaliunas case was denied. Yet the Maskaliunas case sustained the liability based upon the violation of the fencing ordinances, reviewing quite at length Curran v. Chicago & West. Ind. R.R.Co., 289 Ill., 111; Carlin v. Chicago & West. Ind. R.R.Co., 297 Ill.184,

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the photograph, but he says that he saw him in
the photograph.

Q. Now, you say that you saw the person in
the photograph, but you are not sure when you saw him.
A. Yes, I am not sure when I saw him.

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and Livak v. Chicago & Erie R. R. Co., 379 Ill. 212, as well as Heiting v. U. S. I. & P. Ry. Co., 252 Ill. 466, all of which affirmed the validity of the fencing ordinances.

Under these circumstances the contention of the plaintiff that it could not have been the intention of the Supreme court in deciding the Atwood case to lay down a rule which would invalidate the ordinances upon which liability was predicated in the Waskaliunas case, becomes persuasive.

The plaintiff also contends that C. & N. W. R. R. Co. v. Ahens, 306 Ill. 62; Chicago & So. Elec. Co. v. I.C.C.R. Co., 246 Ill. 146; Springfield v. Inter-State Tel. Co., 279 Ill. 324, and Pease v. Chicago Motor Bus Co., 296 Ill. 406, are other cases indicating that the rule laid down is not without exceptions.

It is also contended that the Commerce Commission itself seems to recognize the power of cities and villages in this respect, as where in the matter of the petition of the North Eastern Elevated R. R. Co. for leave to abandon the Kinzie street station, 1 Ill. Com. Comm. 237, it was said:

"The Commission of course has not the power to permit the occupancy of the city streets or in otherwise burdening the streets without the consent of the city authorities; regardless of the status of this ordinance, it appears that the construction, operation and maintenance of the Grand avenue station and the abandonment of the Kinzie street station had the consent of the city authorities and beyond this the Commission would not be concerned."

In Re. St. L. E. & P. R. R. Co., P. U. R. 1923, E. 423, the Commerce Commission, in denying permission to a street railway to abandon part of its line in the City of Litchfield, said:

"Some question was raised in the case as to the rights of the railroad under and by virtue of the franchise license of the City of Litchfield. This Commission is limited in its jurisdiction by the Illinois Commerce Law under which it was created, and is not the proper forum for the adjudication of franchise rights between a utility and a local government."

In re. application of Illinois Northern Utilities Co.,

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for certificate of necessity and convenience to operate and maintain an electric transportation line from the City of Dixon to the City of Belvidere, the Commission, as reported in vol. 5, p. 31, said:

"The necessary permission for the construction of the proposed line shall be secured from the local authorities as required by law."

There are also a number of cases which seem to hold that where the ordinance does not disclose an attempt to exercise police powers and where as exercised and accepted the same constitute a contract between the parties, an estoppel arises to urge that the same are invalid. People v. Suburban R.R. Co., 178 Ill., 607; Rosen v. Royal Indemnity Co., 276 Ill. 179; McC. v. R. R. Co. v. City of Portland, 227 U. S. 592; Jersey City v. Hudson Man. R. R. Co., 90 N. J. L. 383; Jersey City v. North Jersey St. Ry. Co., 61 Atl. Rep. 97; Potter v. Calumet Elec. St. Ry. Co., 155 Fed. 528; City Ry. Co. v. Citizens St. Ry. Co., 166 U. S. 587, 17 Sup. Ct. Rep. 655.

A further consideration is, however, we think conclusive on this point. The statutory power of the City of Chicago in these respects is based on the express grant of control over its streets, as set forth in the Cities and Villages act, and this power, it seems, has been three times granted by the legislature subsequent to the enactment by it of the public utilities legislation. See Session Laws 1921, article 5, page 316, item 26, where the City was given power to require railway companies to fence their respective railroads. This was approved June 30, 1921. Precisely the same grant is made under the act approved June 30, 1925, (see Laws of Illinois, 54th General Assembly, 1925, page 239) and under the act of March 24, 1927, (see Laws of Illinois, 55th General Assembly, 1927, page 293). It would therefore seem that three legislatures, since the enactment of the Public Utilities act,

The committee on education and culture has been working on a bill to amend the law on the organization of the Ministry of Education and Science, which was adopted in 1992.

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have specifically granted to the City of Chicago the power to pass ordinances such as that upon which plaintiff sues. The decisions cited and relied upon by Defendant as holding similar ordinances invalid are based upon the theory that the Public Utilities act, as the later law, repealed the preceding statute, but an examination of these session laws discloses that the grant to the City of this power is later than the enactment of the Utilities acts. This point was apparently not called to the attention of the court in these cases.

Defendant further contends, however, that assuming the validity of the ordinances in question, there is no liability upon the record on account of the absence of proof that defendant was ever notified by the municipal authorities to construct fences. It is urged that such notice is a condition precedent to liability, and Curran v. Chicago & West. Ind. Ry. Co., 230 Ill. 111, and Livak v. Chicago & Erie R. R. Co., 239 Ill. 213, are cited. This contention disregards, we think, the document which appears in evidence as plaintiff's Exhibit No. 7, and which is described as "Acceptance of Speed Ordinance by Chicago & North Western Railway Company filed March 22, 1892." The writing is dated April 5, 1890, and provides:

"Permission is hereby granted to the Chic. & N. West Ry. Co. to proceed to construct, maintain and operate, fences, gates and other safety appliances, and to operate said railway as per manner and form provided for in an ordinance entitled 'An Ordinance to Regulate Speed of Railroads, passed March 22, 1890.'

Provided that each and every provision and requirement of said ordinance, as also the conditions of the General Specifications relating to same, dated April 2, 1890, and accompanying this permit shall be fully and satisfactorily complied with by said Chic. & N. West Ry. Co.

And for failure to comply therewith, or for other reasons, satisfactory to the Mayor and the Commissioner of Public Works, this permit may be revoked and in such case the said Chic. & N. West. Ry. Co. shall be required and hereby agreed to conform to sec. 1830 of the Municipal Code."

It is signed by W. H. Purdy, Commissioner of Public Works, approved by DeWitt C. Cregier, Mayor, and accepted by

Chicago & North Western Railway Company by Marvin Huggitt, President.

When we reflect that the purpose of a notice is that the person notified may have knowledge of that which he is required to do, it is difficult to conceive of proof of a higher nature than that which is presented here. For this reason, apparently, acceptance of the same ordinance seems to have been assumed to be entirely sufficient in Heiting v. C. & N. W. Ry. Co., 253 Ill. 466, and in Maskaliunas v. C. & N. W. Ry. Co., 313 Ill. 142. The contention has no merit. A defendant who has entered a general appearance could as reasonably contend that he had ^{been} never properly summoned to appear in court.

Defendant urges that the court take judicial notice that the Railway company had considerable mileage in other localities of the City of Chicago to which the permit might be applicable and says that there is nothing in the permit to indicate that all of the Railroad company's tracks were to be fenced in order to allow a higher speed on a portion of it. The language of the permission which was accepted by defendant, however, was general, and if there was some part of the defendant's right of way which was thereafter accepted therefrom, the duty would seem to be upon the defendant to make proof of that fact. Indeed, as plaintiff points out, in the Maskaliunas case, the Supreme court held that defendant was operating under the ordinance, although the place where the accident happened was not a part of the City of Chicago at the time the ordinance was passed, and the correspondence between the parties could not have referred to the particular place where the accident occurred because it was not taken into the City of Chicago until long afterwards. Neither in the Heiting case nor in the Liyak case was there any evidence of a notice which specified a particular place where the defendant railroad

was required to fence.

However, the real question here is the alleged duty of defendant with reference to the wall rather than the fence. The specifications provided that whenever any railroad company raised its tracks to a sufficient height to permit the construction of subways under the street crossings, then the construction of subways should be held to be in lieu of fences of any kind along the line of the tracks so raised, and section 6 of the track elevation ordinance provided that when retaining walls were not used the right of way of the railroad company should be fenced "in compliance with the present ordinance of the City relating to fencing of railway tracks." As the undisputed evidence shows that retaining walls were used and the tracks were raised a sufficient height to permit the construction of subways, it would seem that the question of notice under the fencing ordinances becomes immaterial.

Defendant next contends that there was no liability because the declaration does not allege any defect in or failure to construct the wall originally. It is said that the averment of the declaration is only that the wall was permitted to become defective and broken down after it was constructed. The erection of the fences and the retaining walls and the elevation of the tracks were for a similar purpose, namely, to prevent trespassing on defendant's right of way and to protect the public from the dangers incident thereto. This purpose could be accomplished by any one of these three methods, as a barrier was thereby erected tending to prevent such trespassing. The ordinances must be construed together in order to ascertain the intention of the parties. The elevation ordinance specifically referred to the fencing ordinances which must be construed as a part thereof. Evans v. Ill. Surety Co. 298 Ill. 106. Under the circumstances as disclosed the duty to

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fence as prescribed was a continuing duty because of its very nature. The duty to maintain the wall was also a continuing duty and for the same reason. The same observation is true as to the duty to maintain a subway after it is constructed. As plaintiff points out in the different cases which have construed the fencing ordinances, an examination discloses that in not one did it appear that there was any defect in the several fences as the same were constructed, and the defendants were held liable, not upon the theory that they had failed in the duty to construct but rather in the duty to maintain. To give to the elevation ordinance the construction for which defendant contends would be novel indeed and would prevent the realization of what must have been the clear intention of all the parties. The whole of the elevation ordinances when read discloses that the City of Chicago was dealing with an owner operating a railroad and not with a contractor whose duty would end when the improvement was constructed and turned over to the owner. Indeed, the defendant in its brief in the discussion of another point seems to recognize this situation, where it says:

"While the ordinance does not expressly cover the question of maintenance of the structure required to be established, we think maintenance thereof is implied and that the obligation to maintain is just as clearly created as the obligation to construct."

It is next contended that since the rights of way of the several railroads, although adjacent, are owned and operated severally, the obligation to construct and maintain the wall is also several rather than joint. It is true that the ordinance recognizes the several ownership of the rights of way of the respective railroad companies and recognizes the fact that a several operation of the same by the different companies was contemplated and intended by the parties, but it just as clearly in its different provisions recognizes the physical situation of these adjacent lines which it describes, and that it was such

that joint construction was, from an engineering standpoint, the only practicable solution of the problem presented. Defendants consented to such joint construction, and because (as we have already pointed out) defendant agrees to admit maintenance in the future was necessarily implied by voluntarily accepting the easement and taking part in the construction, we think it must be held both roads adopted the east retaining wall of the embankment as their own. From the fact of a joint construction under a contract voluntarily entered into, which in all its provisions looked to the future maintenance and operation of the several railroads over these different tracks as jointly constructed, a joint obligation to maintain the same as constructed must be implied. This view, we think, is supported by the opinions of the highest court of the state rendered in cases where similar questions were involved. I. C. R. R. Co. v. Davidson, 215 Ill. 524; Shea v. C.C.C. & St. L. Ry. Co., 260 Ill. 100; Curran v. C. & W. I. R. R. Co., 289 Ill. 120; Livak v. C. & E. R. R. Co., 299 Ill. 225; Maskellunas v. C. & W. I. R. R. Co., 318 Ill. 142.

A number of further contentions of defendant will not require extended discussion.

It is urged that the damages are excessive. The injury of plaintiff made necessary the amputation of his leg above the knee. For a less serious injury we have sustained a verdict of \$35,000 in Lagattis v. Chicago Daily News, Gen. No. 30071, not reported. The Supreme court sustained a verdict of \$25,000 for a less serious injury in the Maskellunas case. For a less serious injury the Federal court sustained a verdict for damages amounting to \$30,000 in Mayer v. Central Vermont Ry. Co., 26 Fed. 2nd Ser. 907. Similar cases might be cited from many jurisdictions.

It is urged that the court erred in denying defendant's requested instruction No. 12, which told the jury that the provisions

of the statute of the State of Illinois purporting to require every public utility to furnish, provide and maintain such instrumentalities, equipment and facilities as should promote the safety, health, comfort and convenience of its patrons, employees and the public, created no obligation or duty on the part of the defendant company with reference to the retaining wall on the east side of the elevation embankment at the place complained of, and that the jury should not find the defendant Railway company guilty on account thereof. The statute referred to in the instruction is the one relied on in the third count of the declaration. Conceding that statute was not applicable, we should not reverse for the reason suggested, because there is one good count which will sustain the verdict. Scott v. Parlin & Grandriff Co., 243 Ill. 462; Leahy v. Aetna Life Ins. Co., 242 Ill. 403; Spieser v. Star Coal Co., 255 Ill. 540.

Complaint is also made of the third given instruction, by which the court told the jury that in awarding damages they might consider plaintiff's loss of time and inability to work and transact business, if any, on account of such injuries; and such future loss of time and inability to work and transact business after he reaches the age of twenty-one. Richardson v. Nelson, 221 Ill. 254, is cited, and the objection seems to be that the instruction would permit the recovery for loss of earnings which would legally belong to the father and not to the plaintiff. It has been held in cases where the father is guardian ad litem that this objection cannot prevail. In view of the fact that the evidence shows that plaintiff at the time he was injured was only nine years of age and at the time of the trial only twelve years of age, and in view of the further fact that under the laws of this state it was his duty to attend school during all that time, we think the ancient maxim, "De minimis non curat lex" is applicable.

Complaint is made that other instructions requested by defendant were refused, but we think that these involved questions which we have heretofore discussed and decided contrary to defendant's contentions.

It is objected that the fencing ordinances so-called were received in evidence over defendant's objection, but, as already stated, these were practically incorporated into the elevation ordinances by reference, and it would have been error to exclude them. Evans v. Ill. Surety Co., 298 Ill. 166.

Objection is made that evidence was received tending to show that children were accustomed to go upon the submerment, but the objection made was only general. I. C. R. R. Co. v. Wade, 306 Ill. 533; C. & I. A. R. Ry. Co. v. Rathbun, 225 Ill. 283. Moreover, this evidence was admissible to show notice to defendant. N. St. L. Ry. Co. v. Zink, 229 Ill. 183.

It is also urged that plaintiff was a trespasser and that the alleged negligence was not the proximate cause of his injury. Both these questions have been conclusively settled by the cases which we have cited considering the fencing ordinances. Apparently upon the theory that the negligence of the Pennsylvania lines with reference to the wall could not be the proximate cause of the injury, under the holding in Curran v. Chicago & West. Ind. Ry. Co., 249 Ill., 111, an instruction to find for these defendants was given by the trial court. The ruling as to these defendants is not before us. The views of the writer on that question will be found in Curran v. Chicago & West. Ind. R.R. Co., 313 Ill.App. 7.

There being no reversible error in the record the judgment is affirmed.

AFFIRMED.

McSurely, S. J., and O'Connor, J., concur.

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35426

RAYMOND E. GIDLEY,
Appellee,

vs.

CHICAGO SHORT LINE RAILWAY
COMPANY, a Corporation,
Appellant.

25-1A-615²

SUPREME COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case under the Federal Employers' Liability act, and upon trial by jury obtained a verdict for the sum of \$26,000, from which he remitted \$12,000, and thereupon the court, overruling motions for a new trial and in arrest, entered judgment in his favor for \$14,000, which defendant seeks to reverse by this appeal.

The declaration was in three counts. The first alleged that defendant negligently managed and operated its engine so that it struck against a certain coal chute, forcing plaintiff to jump off the engine, whereby he was injured. The second averred that defendant failed to keep its coal chute and dumps in good repair and safe condition and the yards and tracks lighted so that the employees of the defendant could see how to get about and how to do their work safely, and that by reason thereof the defendant's engine collided with the spout of defendant's coal bin, forcing plaintiff to jump from the engine, whereby he received the injury. The third averred that the defendant failed to keep the coal chute in a reasonably safe condition and repair and to keep the yards and tracks lighted sufficiently; that through these and the negligent operation of the engine plaintiff was injured.

It is contended that the court erred in denying a motion of defendant for an instructed verdict at the close of all the evidence, in refusing to give instructions requested by the defendant and in improperly instructing the jury, in refusing to

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

JOHN EDGAR HOOVER, Plaintiff,
vs.
JAMES EARL RAY, Defendant.

JOHN EDGAR HOOVER, Plaintiff,
vs.
JAMES EARL RAY, Defendant.

JOHN EDGAR HOOVER, Plaintiff,
vs.
JAMES EARL RAY, Defendant.

JOHN EDGAR HOOVER, Plaintiff,
vs.
JAMES EARL RAY, Defendant.

JOHN EDGAR HOOVER, Plaintiff,
vs.
JAMES EARL RAY, Defendant.

admit evidence and in denying defendant's motion for a new trial.

There is little conflict in the evidence as to material facts. Plaintiff was an experienced railroad man about 30 years of age and was employed by defendant, a common carrier engaged in interstate and intrastate commerce. On the day of the accident, May 9, 1927, plaintiff began work at 4 o'clock p. m., switching cars for the By-Products Coke Corporation. Between 4 and 8:40 o'clock p. m. 109 cars were switched. Of these cars 106 were assigned to intrastate commerce and 4 to interstate commerce. In moving the cars 22 distinct movements were made. The last movement of any car prior to the time of the accident, the parties stipulate, was intrastate. The yardmaster directed the crew to make that intrastate movement and then go to lunch.

The switch yards in which plaintiff worked were located at 112th street and Terrence avenue. These yards consisted of two lead tracks extending in a general easterly and westerly direction. They ran from Terrence avenue outside the yards, across the streets and along the north end of the switch yards which were enclosed by a fence. Within the yards many switch tracks led off from these two main tracks. East of the streets six switch tracks led off from the two main tracks. The farthest east tracks within the enclosure ran in a southerly direction from the two main tracks and passed close to a large coal bin to which were attached three iron spouts. These spouts, when pulled down, extended over the tracks and were used in transferring coal from the bin to the engine. When the spouts were up in their regular place they stood at an angle, nearly perpendicular against the side of the coal bin. A few feet from the coal bin were two yard lights with reflectors. These were used to light up the coal chutes and that part of the yard in which they were situated.

The coal chute was 36 feet high, 22 feet long, 16 feet

wide. The spouts faced west and each spout was 4½ feet long, 3 feet wide and had sides tapering from 18 inches at the place where they were fastened to the coal bin to 6 inches where the coal passed into the engine. The spouts were operated on a cable which ran from the western end of each spout over a chive. A counterweight on the cable ran up and down the side of the chute. The bottoms of the spouts were fastened to the coal chute about 13 feet above the ground. When elevated these spouts were at an angle of about 45 degrees and were operated by a person standing on the tank of the engine and pulling down a hook or rod placed at the end of the spout, and the coal was thus moved by force of gravity into the coal box. West of the coal bin was a switchman's shanty where the crews at work oftentimes ate their meals.

On this particular afternoon there was intermittent wind and rain which, however, did not stop the work. The yardmaster directed that the crew proceed to lunch after completing an intrastate movement. Then the engine, after completing the intrastate movement, backed north to the main lead track and moved on that track until it came to the switch track leading past the coal bin. Plaintiff threw the switch and then got on the engine, as he testified, to get his coat, and the engine moved south at a speed of two or three miles an hour. Plaintiff stood in the gangway between the cab and the tender of the engine. The engine ran into the southernmost spout, which was down. There was a crash, the whistle and the cab were wrenched off the engine, the fireman and plaintiff jumped from the gangway to the ground, and in alighting plaintiff received the injury for which he sues and which medical witnesses describe as a fractured semi-lunar cartilage.

Plaintiff earned an average of \$200 a month. The evidence tends to show that the injury is permanent and is of such a nature as to make it impossible for him to perform his usual

services and duties, such as he had hitherto given the railroad companies he served.

Only one switch engine was working in the yards on the night of the accident, and when the hostler loaded this switch engine with coal about four o'clock p. m., he used the southern spout of the coal chute, which was then working properly; thereafter the engine moved under it once when the engine started with the night's work.

It is contended by the defendant that the instruction to return a verdict in its favor should have been given because the evidence shows that the violation of a rule of the defendant by plaintiff was the proximate cause of his injury. The supposed rule was that an employee directing the movements of an engine when cars were not attached thereto from one part of the switch yard to another should ride upon the leading footboard of the engine. No rule of this kind was proved, but several witnesses for defendant testified that such was proper railroad practice. This was denied by the plaintiff, and there is proof in the record tending to show that such alleged rule did not uniformly obtain. Defendant has cited numerous authorities to this proposition, including Virginia Ry. Co. v. Linkous, 230 Fed. 88; Phensant v. Director General of Railroads, 285 Fed. 344; Great Northern Ry. Co. v. Wilgg, 245 U.S. 444; Unadilla Valley Ry. Co. v. Caldine, Admr., 278 U. S. 136, and Unadilla Valley Ry. Co. v. Dibble, opinion by the U.S. Circuit Court of Appeals handed down March 11, 1929.

The cases cited announce the undoubted rule that a plaintiff may not recover where his negligence is the sole and only cause of his injury. We do not regard these decisions as applicable to the facts in this case. Here, the existence of the alleged rule is denied, making an issue for the jury; and it cannot be said (conceding negligence on plaintiff's part) that such negligence was

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the sole and only cause of the injury. The jury might properly have found that either the failure to furnish light or the defective condition of the spout was the proximate cause of plaintiff's injury. At the most it could only be said that plaintiff was guilty of contributory negligence, which is not a defense to an action under this statute. Davis v. Dowling, 284 Fed. 670.

Defendant next contends that there was no evidence of negligence on its part, and cites C. & St. P. Ry. Co. v. Coogan, 271 U. S. 472. It is suggested that defendant was not negligent insofar as the spout was concerned because it was put out of place by a windstorm. The evidence does not establish this supposed fact; it is only surmised and is the same kind of evidence which the Supreme Court in the Coogan case held would not justify recovery by a plaintiff. There is no adequate explanation as to the reason why the spout was out of place nor as to the failure to have the yard lighted, and the duty to explain was on the defendant. Central R. Co. v. Felaco, 286 Fed. 661; Davis v. Dowling, supra; C. & St. P. Ry. v. Coogan, supra.

It is suggested that plaintiff assumed the risk of his injury. Toledo, M. & W. R. Co. v. Allen, 48 S. Ct. 315; D. L. & W. R. Co. v. Asako, 49 S. Ct. 302, are cited. These cases are easily distinguishable. An employee does not assume dangers which are extraordinary, unknown and unusual. At any rate, under the facts which here appear the question was for the jury.

It is further contended that plaintiff was not engaged in interstate commerce at the time he was injured and that the Federal Employers' Liability Act is therefore not applicable. Ill. Cent. R. Co. v. Mahreng, 233 U. S. 476; Southern Ry. Co. v. Murphy, 70 S. S. Rep. 972, are cited. These cases are applicable where the movement being made is either intrastate or interstate. Here the last movement of the engine, which was intrastate, had

been ended. During the afternoon movements both in intrastate and interstate commerce had been made, in which plaintiff and those working with him had assisted. The purpose of the movement at the particular time at which he was injured was to take the crew to the shanty where they were to eat their supper, and this purpose was incidental and necessary to intrastate as well as interstate commerce. The facts are uncontradicted. We think, as a matter of law the movement must be regarded as interstate. E. & O. R.R. Co. v. Rasi, 229 Fed. 419; Engineer v. Wabash Ry. Co., 6 E. F. (2d) 847. The Supreme court has refused to lay down any general rule further than that stated in Shanks v. E. P. & W. R.R. Co., 235 U. S. 556, as to when a particular movement is or is not in interstate commerce, and each case must be decided upon its own particular facts.

It is urged that the amount of the judgment is excessive, but in view of the permanent nature of plaintiff's injury and the amount of the remittitur required, discussion of this point is unnecessary.

We find no error in the record, and the judgment will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

33449

ARNOLD WALLACE, a Minor, by
Ruben Wallace, his Next Friend,
Appellee,

vs.

CRANE CO., a Corporation,
Appellant.

254 1A 615
APPEAL FROM CIRCUIT COURT
OF COLE COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of \$1,000 entered upon the verdict of a jury in an action on the case for personal injuries.

The declaration was in three counts. The first count alleged that on August 3, 1925, plaintiff was riding a bicycle westerly on Archer avenue when defendant, through its negligence, drove one of its trucks against the bicycle, injuring plaintiff. The second count charged that the defendant "knowingly and wantonly ran its truck against the plaintiff's bicycle," and the third count charged that the truck was driven at an unreasonable speed through a closely built-up residential district.

The errors assigned and argued are that the judgment is against the manifest weight of the evidence; that the court erred in denying defendant's motion for a directed verdict in defendant's favor, and in admitting certain evidence over objections.

The evidence as hereinafter recited shows that there was no evidence tending to sustain the wilful and wanton count.

It is argued that the court erred in admitting in evidence certain X-ray plates and that no proper foundation was laid for the testimony; but we are not impressed with this contention. It is also argued that the court erred in refusing to instruct the jury at the close of all the evidence to find for the

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

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FROM: [Name]
SUBJECT: [Subject]

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defendant, but we think that under the rule laid down in McGregor v. Reid, Murdoch & Co., 178 Ill. 464, continually and consistently followed since by our Supreme court, we cannot so hold.

The controlling question in the case therefore is whether the verdict and the judgment are against the manifest weight of the evidence. ^{it} That is the duty of this court to examine and weigh the evidence and to reverse where the judgment is against the manifest weight of it, has been decided in many cases which have consistently followed Donelson v. West St. Louis Ry. Co., 235 Ill. 625.

The evidence tends to show that plaintiff at the time of the accident, which occurred on the morning of August 3, 1935, was fourteen years of age and was riding a bicycle in a south-westerly direction on Archer avenue in Chicago. He proceeded on the north side of the street about 3 or 4 feet north of the west-bound street car tracks. At the point of about a hundred feet west of the intersection of Archer avenue and Line street, a truck owned by defendant and driven by one of its servants overtook and passed him. The truck was a 6,000 pound Packard, 18 feet long with four wheels, and was empty.

The driver says he signalled his approach, but this is denied by the plaintiff. Plaintiff says, however, that he heard the noise of the truck as it approached and moved over nearer to the curb. He was then, he says, about five feet from the car track when the front part of defendant's truck passed him. The distance between the north street car rail and the north curb of the street is 16 feet. The driver of the truck saw plaintiff and testifies that just before the accident plaintiff appeared to lose control of his bicycle and tilted toward the truck. The driver did not see whether plaintiff actually fell against the track or struck the pavement. Plaintiff says that the truck got just about even with

him when it started to turn in front of him (that would be to the right); that the front end of the truck passed him when he was about five feet from the car track; that the truck was not on the street car tracks. Plaintiff says that the truck was going 25 to 30 miles an hour; that he so judged from the way the bike flew when it was hit and from the noise it made; that he was traveling on his bicycle at a rate of about 3 miles an hour.

Plaintiff further testifies that a boy friend of his, one Ray Charbonneau, who was also riding a bicycle, accompanied him, but that Ray rode on ahead and was "away up ahead of me."

Ray testifies that just before plaintiff was struck he, the witness, had crossed over to the south side of the street; that the truck was going at 20 or 25 miles an hour, and that as it swung to the left to pass plaintiff it speeded up more; that as the truck was passing plaintiff the rear end of the truck hit the bicycle; that it looked like the truck skidded over to one side. He also says that the wheel of the truck struck a hole which was two inches deep and about thirty inches long and parallel to the car tracks. On cross-examination he admitted, however, that he was about a hundred feet from plaintiff on the opposite side of the street, standing and waiting there for him to come up; that the truck gradually shut off his view of plaintiff so that as a matter of fact he couldn't see just exactly how the accident happened. His evidence is so contradictory and improbable that it has little weight.

The driver of the truck testifies positively that the truck was right in the tracks; that it did not run into any hole; that it did not skid; that he did not swing to the right.

Dr. Chivers for the defendant testified that he visited plaintiff on August 4th at the hospital and that at that

time plaintiff told him that he was riding the bicycle close to the curb; that a boy called to him and plaintiff turned his head and ran into the truck that was passing.

Thomas Berner, an employee of the defendant company, who was driving a Ford coupe in the opposite direction on this street at the time of the accident, took plaintiff to the hospital. He says he asked him how the accident happened and that plaintiff told him he was on his bicycle and that he was riding southwest; that some boy on the sidewalk called him and that in looking around he swerved his machine into the side of the truck.

Raymond Thompson, a driver of a truck for the Chicago Tribune, was going east on Archer avenue to Halsted street at this time. He saw defendant's truck going west on Archer avenue and a boy riding alongside of the truck on a bicycle. He says, "The street was rather bad there and the boy sort of fell towards the truck, and I passed the Crane Co. truck to Line street, where I stopped;" that he was about a half block away when he saw the boy fall; that it seemed as though he sort of tilted towards the truck, "acted as if he had hit a slope and slanted in towards the truck, then my vision was cut off by the front end of the truck. I did not see him actually fall." He further testified that the Crane company truck was in the westbound car tracks and was going at a speed of about 15 miles an hour; that it continued going southwest in the car tracks until it stopped. He says:

"At the time of the collision the Crane Co. driver did not turn to the right or left out of the car tracks but stayed right in the car tracks and left the truck stand in the car tracks when he got out to pick up the boy. The truck did not skid or sway at all but remained in the car tracks. I was coming up in the east bound car track and saw the Crane Co. truck all the time."

He further testifies that there were no holes on either side of the rails of the street car tracks; that the street was what you would call warped; that between the curb and the rails the pavement was asphalt and cobblestones between the rails; that along the side of

the rails there were places where the asphalt pavement has been worn out and chipped off; that they were not naturally holes, that it was more like a hill.

The facts with reference to the sudden turning of the truck as related by the plaintiff seem improbable, if not physically impossible, in view of the actual situation as related by all the witnesses. Two witnesses testified that plaintiff's story which he told to them as to the manner of the accident was contrary to that which he now narrates. Two other occurrence witnesses deny the accuracy of his testimony as to the manner in which he was injured. He is corroborated as to some facts only by his boy friend, whose testimony is so contradictory and improbable as to be of little, if any, weight.

We must therefore hold that the verdict and the judgment are manifestly against the weight of the evidence. Under these circumstances the trial court should have granted a new trial, and for its error in this regard the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a fresh blanket after a long, hot summer. I took a deep breath and felt my lungs expand. The world around me seemed so new, so different. I had never before.

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33490

WAL. VERMILION,

Appellant.

vs.

UNITED CIGAR STORES COMPANY
OF AMERICA, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in favor of the plaintiff upon a motion by defendant in the nature of a writ of error ~~per~~ habeas filed under section 86 of the Practice act.

The original suit was in tort for personal injuries alleged to have been sustained by plaintiff on June 20, 1928, by reason of plaintiff falling through a coal hole in a sidewalk. The City of Chicago and others were summoned as defendants, and a declaration was filed, to which the United Cigar Stores Company of America interposed a general demurrer. Thereafter an order was entered by the court on October 6, 1928, overruling this demurrer and ordering defendant to plead within six days. On October 20, 1928, a further order was entered finding that defendant had failed to comply with the rule to plead and defaulting defendant for that cause.

The motion which it is here sought to review was filed thereafter on November 17, 1928, and prayed that the order of default be set aside. Assuming, as the defendant contends, that the record would justify and compel the allowance of the motion, we are of the opinion that this court is without jurisdiction for the reason that no final judgment was entered in the original suit. As was said in Chapman v. North American Ins. Co., 292 Ill. 179:



THE HISTORY OF THE UNITED STATES OF AMERICA

This is the first of the series of books which will be published by the author. It is the history of the United States of America from the first settlement of the continent to the present time. The author is a native of the United States and has spent much of his life in the study of the history of his country.

The first volume of the series is devoted to the history of the United States from the first settlement of the continent to the present time. It is the history of the United States of America from the first settlement of the continent to the present time. The author is a native of the United States and has spent much of his life in the study of the history of his country. The second volume of the series is devoted to the history of the United States from the first settlement of the continent to the present time. It is the history of the United States of America from the first settlement of the continent to the present time. The author is a native of the United States and has spent much of his life in the study of the history of his country. The third volume of the series is devoted to the history of the United States from the first settlement of the continent to the present time. It is the history of the United States of America from the first settlement of the continent to the present time. The author is a native of the United States and has spent much of his life in the study of the history of his country.

The fourth volume of the series is devoted to the history of the United States from the first settlement of the continent to the present time. It is the history of the United States of America from the first settlement of the continent to the present time. The author is a native of the United States and has spent much of his life in the study of the history of his country. The fifth volume of the series is devoted to the history of the United States from the first settlement of the continent to the present time. It is the history of the United States of America from the first settlement of the continent to the present time. The author is a native of the United States and has spent much of his life in the study of the history of his country.

"At common law the writ of error super verba could be sued out of the same court when a judgment of law was rendered to reverse the judgment, and before the same judge who rendered the judgment, for an error of fact that might be brought to the knowledge of the court that would be sufficient, of itself, to defeat the judgment. Such an error of fact which may be assigned under such writ, or by motion under Section 89 of our Practice act, which is controlled by similar rules, must be some fact unknown to the court at the time judgment was rendered, as well as one which would have precluded the rendition of the judgment."

We are aware of no case which would justify the allowance of a motion under section 89 before a final judgment has been rendered in the cause. The entry of the default was not a final judgment, and no appeal therefrom would lie. Mass v. People, 34 Ill. 247. The trial court could set the order of default aside, and there may be no final judgment against appellant in the case. If we had jurisdiction we would direct the trial court to set aside the order of default. We assume that it will do so.

As the appeal is premature it must be dismissed.

APPEAL DISMISSED.

McSurely, F. J., and O'Connor, J., concur.

33000

CATHERINE HINZ,
Defendant in Error,
vs.
ERNEST HINZ,
Plaintiff in Error.

KNOWLEDGE OF CIRCUIT COURT
OF CASE HISTORY.

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, who on July 13, 1916, was divorced from his wife, Catherine Hinz. The appeal is from an order which denied the prayer of his petition that the alimony as settled in her favor by the decree should be further reduced.

It would appear from the statements of the parties that the bill as originally filed was for separate maintenance and that a decree was entered; that later the bill was amended and a decree of divorce granted as prayed. Neither the separate maintenance nor divorce decree, however, is in the record.

The petition of defendant avers that at the time of the entry of the decree the petitioner was earning \$600 a month; that he is now selling goods upon a commission basis; that he is unable to obtain employment at a salary, and that he has no property or resources out of which to make the payments; that his earnings for November, 1928, were \$108.36, for December, 1928, \$19.75, and a like amount for January, 1929.

No answer was filed by the complainant wife, Catherine Hinz. She testified on the hearing.

Petitioner says that at the entry of the decree his gross income was \$600 a month; that his present income for three months was about an average of \$100 a month; that he is working on a commission basis and "not able to make what I used to;" that the entire condition of the textile business has changed; that he had a stroke of apoplexy several years ago and has not been "able to

1957

hustle" as formerly. He is remarried and his present wife and her mother reside with him in a flat of six or seven rooms, for which he pays \$175 a month rent. He says he has tried unsuccessfully to get the lease cancelled; that he has no other property than his income; that his present wife takes in sewing and does her own housework.

It also appears from the evidence that his former wife, Catherine King, has not remarried; that she is suffering from chronic bladder trouble and requires the constant care of physicians; that she is 52 Years of age; that she pays \$67.50 a month for a flat with gas; that she has no income except payments made by petitioner; that she has two married daughters who can scarcely take care of themselves.

The alimony paid by defendant was \$300 a month and it was afterwards reduced to \$175 a month. He does not state precisely what further reduction should, in his opinion, now be made.

The only question before this court is whether the chancellor abused his discretion in refusing to enter an order reducing the alimony. The only authority so to do is under section 18 of the Divorce act, and all the presumptions are, of course, in favor of the decree, which, as already stated, is not before us.

Petitioner made proof of his income for only three months. This would hardly seem to be sufficient to show such a permanent change in his financial condition as would justify a further modification of the decree. His testimony is in many respects vague and uncertain in view of the nature of the proceedings. He does not state whether he owns real estate nor whether any real or personal property is held in trust for him.

investigative, as I remember. He is remembered and his memory is not
any other person with him in a time of six or seven years, but
which he says with a certain name. He says he has been personally
to get the same results; that he has no other property than
his income; that his present will state in writing and does not say

Investigative.

It also appears from the evidence that his income will
gathered from, has not remained; that he is gathering from
chronic bladder trouble and requires the constant care of physicians;
that she is 32 years of age; that she says that a month or two
with her; that she has no other property except the property;
that she has two married daughters who are personally known to

Investigative.

The alimony paid by defendant was \$500 a month and 1/2
was afterwards reduced to \$275 a month. He has not been able
clearly that under husband's assets, in his opinion, was to make.
The only question before this court is whether the
prosecutor should be allowed to introduce evidence in order
to rebut the alimony. The only question is as to the matter
section 18 of the Divorce Act, and the prosecution, No. 2
concerns, in favor of the woman, which, as already stated, is not
before me.

Testimony was given of the income of the woman and of the
woman. This would hardly seem to be sufficient to show that a
payment should be made to the woman. The testimony in this case
further establishes the woman. The testimony in this case
respects value and necessity in view of the nature of the woman's
life. He does not state whether he owns any other property
any real or personal property is held in trust for him.

It would seem that in fairness and justice the relief which petitioner asks would demand as full and complete disclosure as a bankrupt asking to be discharged from his debts would be required to make. Petitioner is not precluded from making a further showing.

We would not be justified in finding on this record that the Chancellor abused his discretion, and for that reason the order is affirmed.

AFFIRMED.

McCurdy, P. J., concurs.

O'Connor, J., dissents.

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33840

254 I.A. 616

ALLIANCE FINANCIAL CORPORATION,
a Corporation,

Appellant,

vs.

M. A. WICHNA, Doing Business
as WICHNA MOTOR SALES,
Appellee.

APPEAL FROM CIRCUIT COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case there is no dispute upon any material question of fact. On August 28, 1928, plaintiff sued out a writ of replevin for an Auburn sedan automobile. The writ was served on defendant Wichna and the auto turned over to the plaintiff. Defendant claimed right to possession on account of repairs made by him upon the automobile to the value of \$200. A man named Joe Martin brought the vehicle to defendant's place of business and requested that these repairs be made, and defendant in good faith supposed that Martin had authority to order the repairs.

The owner of the car was Sam Cannizaro. On March 9, 1928, he executed and delivered to plaintiff a chattel mortgage on the automobile to secure an indebtedness represented by notes amounting to \$619.14. Cannizaro defaulted in payments; the plaintiff mortgagee demanded possession but was informed that the automobile had been placed with the defendant for repairs and was being held by him for the repair bill. Defendant offered to surrender the car if the bill was paid.

Plaintiff's agent, one Krause, went to defendant's place of business, showed him a check for \$200 payable to defendant's order and signed by the plaintiff company, and said he would pay the defendant \$200 if he got the car in good condition. He asked to look at the car, and defendant had it driven to the curb

in front of his place of business, whereupon the writ was served and the officer took possession of the car and drove it away.

On August 30, 1928, plaintiff served a notice of sale under the mortgage, and thereupon ~~defendant~~ *Carrizosa* paid the mortgage in full to the plaintiff.

Trial was by the court without a jury. Findings of fact and propositions of law were presented to the trial court, who refused to hold that the plaintiff made a demand for the automobile prior to the beginning of the proceedings. The court held that there was no fraud or collusion between the mortgagee and the plaintiff; that the lien of the chattel mortgage was at the time of the institution of these proceedings superior to the lien of the defendant for work and labor performed and materials furnished for the repair of the automobile; that the right to the possession of the property replevied was in the plaintiff except that at the time it was taken from defendant it was rightfully held by him for the payment of money owing to the defendant, which at the time of trial amounted to \$200; and a judgment order was entered in favor of plaintiff, with the alternative that plaintiff pay to defendant \$200 within ten days, in default of which a writ of extrema habenda issue. From that order plaintiff has perfected this appeal.

Upon the authority of Murlich v. Chapple, 311 Ill. 467, and Bathen Stone Co. v. Ellerson, 230 Ill. App. 593, it is urged that the lien of the previously recorded chattel mortgage was prior to the defendant's lien as an artisan for repairs on the automobile. These cases so hold, and there is no dispute upon that proposition. However, on the trial it was made to appear that the lien of the mortgage had been satisfied. Well considered authorities hold that in an action of replevin the court may inquire into the possessory rights of the parties after the suit was begun down to the time judgment for possession is asked; and if such rights

1. 1990年12月25日，在《人民日报》发表署名文章《论中国民主政治的发展》，指出中国民主政治的发展，必须从中国实际出发，不能照搬西方模式。

There is a 20% increase in the number of people who are employed in the service sector.

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have changed, such judgment should be entered as the justice of the case may require. Whitwell v. Wells, 41 Mass. 20; Lytle v. Bayley, 83 Mass. 381.

The delivery of the automobile to plaintiff by the officer did not affect the legal rights of the parties; plaintiff merely became its custodian until the rights of the litigants should be determined. Bramer v. Dyball, 42 Ill. 34.

The court had power to enter judgment in the alternative. See sec. 22, chap. 119, Smith-Hurd's Rev. Stat. of Ill. 1927.

The judgment is affirmed.

AFFIRMED.

McSurely, W. J., and O'Connor, J., concur.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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• *Journal of the American Medical Association*, 2000; 283: 2686-2692

33562

ALBERT PASCHKE, P.
Appellee,

vs.

WALTER P. SCHNEIDER,
Appellant.

2011A. 518
APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Paschke sued defendant Schneider in tort for an alleged assault and battery. Defendant filed pleas of the general issue and a special plea that plaintiff made an assault upon him and would have beaten him if he had not defended himself; that any force used by him was necessary in his own defense.

There was a trial by jury and a verdict in favor of the plaintiff with damages assessed at \$1200, and the court, overruling motions for a new trial and in arrest, entered judgment for that amount.

The appeal is brought by defendant and plaintiff has not appeared in this court to support the judgment. Assignments of errors argued are numerous.

The alleged assault occurred on October 30, 1926, about midnight, near 5736 N. Hermitage avenue, Chicago. Plaintiff was then 63 and defendant 33 years of age. Plaintiff was a farmer and also owned a building at 5656 N. Hermitage avenue and acted as janitor of the same. He testified that after doing his work that evening, defendant Schneider followed him and when he got as far as Schneider's building plaintiff turned and said, "Let alone. I have nothing to do with you;" that Schneider said, "I am going to kill you." He said that defendant hit him and then he, plaintiff, hit Schneider "with a little bit of a thing, two feet long and an inch wide;" that he, plaintiff, did not exactly knock defendant down when he hit him, but "I held him down and I don't hit any more

after that. He didn't go way down. I grabbed him and held him down. I grabbed and wrestled with him. He didn't holler for help. No, I had him down; he couldn't move any more; he was already helpless and I walked home. I was just full of blood all over. I had to wash myself. I didn't sleep the whole night that night. The blood was all over my clothes."

Plaintiff also said that he had had no trouble with the defendant that he knew of; that defendant hit him twice with his fist and then plaintiff looked around there and found a stick. Plaintiff said, "I didn't lay him out. It was about a minute from the time he hit me on the head before I found the stick." When plaintiff was asked what defendant did after he hit plaintiff, he answered, "He couldn't do anything after that for I grabbed him, I got him down. I grabbed him, of course."

It appears that prior to this occurrence defendant brought a suit against plaintiff, and this is the only reason the record shows for the ill-feeling apparently existing between them.

Defendant testified that plaintiff lay in wait for him, called him a vile name, said he was going to kill him and assaulted him with a stick, and defendant struck plaintiff in his own defense.

A consideration of all the evidence leaves the impression that defendant has given the more probable account of the occurrence, but the condition of the record is such that we do not find it necessary to pass upon the contention that a new trial should have been given because the verdict was against the preponderance of the evidence.

Defendant complains of the attitude of the trial court and of his active participation in the trial, and in our opinion an examination of the record justifies the complaint.

In the course of a proper cross-examination the trial court said to the attorney for defendant:

"If you persist, no matter what the verdict will be, the court will set it aside instantler.

The court sustained the objection and if you persist on this line of questioning, and if the verdict results in your favor, the verdict will be set aside."

When the attorney for defendant asked, "Can't I go into the motive or reason why this thing happened?" the court said: "So, your man had no right to do anything, no matter what motive, had no right to follow him in the middle of the night. Objection sustained."

Again, when the attorney for defendant said, "I am interested in this stick" (referring to the testimony of plaintiff to the effect that he had struck defendant with a stick) the court said: "Will you please stop talking; you will talk yourself out of court."

The right of trial by jury amounts to little where the trial judge assumes a partisan attitude.

It is also contended that the trial court erred in giving certain instructions to the jury at the request of the plaintiff. By instruction No. 1 it was said:

"The court instructs you that although the burden is upon the plaintiff to prove his case by a preponderance of the evidence, yet if it preponderates in favor of the plaintiff but slightly, it would be sufficient for you to find a verdict for the plaintiff."

Such an instruction was condemned by the Supreme court in Reivitz v. Chicago Rapid Transit Co., 327 Ill. 507, although the error in giving it was held not to be reversible under the particular circumstances appearing there. It should not have been given in this case.

By another instruction the court told the jury:

"If you find for the plaintiff you will award him such damages as will fairly compensate him for any injuries or indignity he may have sustained. In awarding such damages you may consider the character of his injuries, what physical injuries, if any, he sustained, and also the mental suffering, if any; also any sense of shame or humiliation he may have suffered on account

of such wrongful acts, if any, that were committed against him and award him such damages as will be a fair compensation in the premises."

By another instruction the court told the jury:

"In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and should take into consideration all the facts and circumstances attending the injury appearing from the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence, his bodily suffering, if any, resulting from such physical injuries, his loss of time and inability to work, if any, on account of such injuries, and may find for him such sum as in the judgment of the jury, under the evidence and instruction of the court in this case, as will be a fair compensation for the injuries he has sustained, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration and proved by the preponderance of the evidence."

There was no evidence in the record tending to show that plaintiff had lost any time or had been rendered unable to work by the injuries received. There was no evidence tending to show, or allegation in the declaration, that plaintiff had suffered mentally or from a sense of shame or humiliation, and these instructions should not have been given. Chicago & Alton R.R. Co. v. Martin, 183 Ill. App. 254; Garvey v. Met. West Side Ry. Co., 155 Ill. App. 601; Manufacturers Fuel v. White, 223 Ill. 187; Selland v. Nelson, 132 N. W. 220 (N.D. 1911); Laggar v. Metcalf, 24 Mo. 1094 (1898).

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

33731

DOVENMUEHLE, Inc., a corp.,
Appellee.

v.

ALBERT J. TERRELL et al.,

ALBERT J. TERRELL,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On June 27, 1929, complainant, Dovenmuehle, Inc., a corporation, filed its bill to foreclose a trust deed, by which Fred Kisley and wife conveyed certain real estate to secure an indebtedness of \$5500, represented by four principal promissory notes Nos. 1, 2, 3 and 4, notes Nos. 1, 2 and 3 being for the sum of \$250 each and note No. 4, for the sum of \$4,750, said notes bearing interest at the rate of six per cent per annum, which was represented by interest notes or coupons.

The bill alleged that complainant was the owner of the principal notes Nos. 1 and 2 and of interest coupons Nos. 5 and 6, said interest coupons being for the sum of \$167.50 each; that default had been made in the payment of the same when due.

The bill further set up at length the provisions of the trust deed, waived answer under oath, prayed for an accounting and for a sale of the premises in default of payment of the amount found due. It also prayed that a receiver might be forthwith appointed without notice, as provided by the trust deed, to take possession of the premises, with power to collect the rents, issues and profits during the pendency of the foreclosure suit

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On June 15, 1966, the following information was received from the Bureau of the Census, Washington, D.C.:

The Bureau of the Census has received information from the Internal Revenue Service that the following individuals have been identified as having received income from the sale of U.S. Government bonds during the period from January 1, 1964, to December 31, 1965:

1. [Name redacted] - \$10,000.00

2. [Name redacted] - \$5,000.00

3. [Name redacted] - \$2,500.00

4. [Name redacted] - \$1,000.00

5. [Name redacted] - \$500.00

6. [Name redacted] - \$250.00

7. [Name redacted] - \$125.00

8. [Name redacted] - \$62.50

9. [Name redacted] - \$31.25

10. [Name redacted] - \$15.62

11. [Name redacted] - \$7.81

12. [Name redacted] - \$3.91

13. [Name redacted] - \$1.95

14. [Name redacted] - \$0.98

15. [Name redacted] - \$0.49

16. [Name redacted] - \$0.24

17. [Name redacted] - \$0.12

18. [Name redacted] - \$0.06

19. [Name redacted] - \$0.03

20. [Name redacted] - \$0.01

The above information was obtained from the Bureau of the Census, Washington, D.C., and is being furnished to you for your information.

Very truly yours,
[Signature]

Enclosed for you are two copies of the above information.

[illegible]

(and in case of sale ^{and} a deficiency) during the statutory period of redemption or until the further order of the court. The bill was verified and a copy of the notes, interest coupons and trust deed attached thereto.

On June 28th complainant filed its petition for the appointment of a receiver, reciting the pendency of the foreclosure proceedings and averring that Albert J. Terwell acquired title to the equity of redemption of the premises on or about March 14, 1929, by conveyance from the former owner for the sole purpose of collecting the rents and income during the period of redemption under a decree of foreclosure entered August 13, 1926, foreclosing a second mortgage on the real estate and premises.

The petition also averred that the premises consisted of a two-flat building; that the monthly income of rent was \$70 a month; that Terwell after acquiring title refused to pay the notes and interest notes sought to be foreclosed and refused to pay the second installment of a special assessment for paving which was then due and payable and "will refuse to pay the taxes on said premises and will refuse to expend any money on said premises during the period of redemption thereof, and that your orator, as the owner and holder of the principal notes and interest notes herein sought to be foreclosed, will be greatly prejudiced and injured if a receiver is not appointed herein forthwith, with the usual powers of receivers in chancery, with the power to collect rents, issues and profits of the aforesaid real estate and premises, until the further order of the court."

The petition also averred that the rents for the month of July, 1929, would fall due on the first day of July; that Terwell was seeking to collect the same and would refuse to surrender the same if he was given notice of the application for the appointment of a receiver; wherefore the petitioner prayed that the receiver be

appointed forthwith without notice and without requiring bond and that the receiver be authorized to take immediate possession to collect the rents, etc.

On the same day the following order was entered:

"This cause having come on to be heard upon the motion of Otto G. Hyden, solicitor for complainant herein, for the appointment of a receiver, and upon petition of complainant herein in support of said motion and upon the bill of complaint herein and upon the proofs taken in open court and upon the argument of counsel for the respective parties, and the court being now fully advised in the premises, finds that it has jurisdiction of the subject-matter and of the parties, and that said motion for appointment of a receiver should be sustained.

"Now, therefore, in consideration thereof, it is hereby Ordered, Adjudged and Decreed, and the Court Doth Heresby Order, Adjudge and Decree that George C. Mesake, of the City of Chicago, County of Cook and State of Illinois, be and he is hereby appointed Receiver of the real estate and premises described in said petition and in the bill of complaint herein, to-wit:***

"And for good cause shown, it is hereby further Ordered, Adjudged and Decreed that said Receiver be, and he is hereby appointed without bond on the part of the complainant for the appointment of said receiver***."

From this interlocutory order the owner of the equity, Albert J. Terrell, has appealed to this court. It is urged that the order should be reversed because the record fails to disclose a compliance with section 54, chapter 22, of the Statutes of Illinois, which provides in substance that before any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court or judge; "provided, that bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond."

This section of the statute was construed by this court in Watson v. Cudney, 144 Ill. App. 624, which holds in substance that under the provisions of the statute a party applying for a receiver must either give bond or it must be found by the court that upon notice and full hearing the giving of bond should be dispensed with. The order was reversed.

In the later case of Sherman Park State Bank v. Loop Office Bldg., 338 Ill. App. 450, it was held that an order which provided for the appointment of a receiver without giving bond was improperly entered, unless the order affirmatively showed that the appointment should be made without such bond and also unless it found facts excusing the giving of a bond and recited the specific reasons for the appointment of the receiver. The authorities were there cited and reviewed, and it is unnecessary to here repeat what was there said. The order was reversed.

To the same effect is the later case of National Plumbing & Heating Supply Co., v. Ill. Wood Preserving Co., 239 Ill. App. 69, where the cases are again cited and reviewed and the order reversed. The same rule is announced in Foreman Trust & Savings Bank v. American Sash & Door Co., Gen. No. 33653, an opinion by the third division of this court filed July 3, 1930, not yet reported.

The complainant contends that the law as announced in these decisions has been "somewhat modified and softened" by the opinions in Bothman v. Lindstrom, 221 Ill. App. 262, Valenti v. Arelik, 234 Ill. App. 407, and McDonnell v. Woods, 247 Ill. App. 170.

Bothman v. Lindstrom, *supra*, was a case where the question at issue arose on a contest between the holder of a deficiency decree and the owner of the equity of redemption, who had purchased the interest of the mortgagor and taken an assignment of the rents in the hands of the receiver several months after the deficiency decree was entered. The facts concerning the original appointment of the receiver are not recited in the opinion further than to state that so far as the record discloses no objection was made when the receiver was appointed nor any motion thereafter made to discharge him, from which we think it is fair to infer that either the holder or his predecessor in interest had notice of the

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资料来源：根据《中国统计年鉴》、《中国农村统计年鉴》和《中国人口统计年鉴》有关数据整理。

appointment. Moreover, the facts which we have stated easily distinguish that case from this one.

In Valenti v. Eroluk, supra, Valenti, who was complainant in a foreclosure proceeding, sued out a writ of error to reverse an order of the Circuit court entered upon the petition of Albert J. Terrell, the purchaser of the equity of redemption, wherein the court found that a previous order entered on January 6, 1921, appointing a receiver of the premises, was void in that the order did not require complainant to give bond and did not find that upon notice and full hearing and for good cause shown he was excused from so doing. The receiver in that case had entered into possession and collected \$1044.42, out of which he had expended for taxes, ^{insurance,} repairs and attorneys' fees, all of said amount except the balance on hand of \$582.30. The trust deed in that case expressly conveyed the rents, issues and profits of the estate as well as the fee, and provided that the grantors waived the right to possession and income from the premises pending the foreclosure proceedings and until the period of redemption should expire. The holder of the equity had been given notice of the application to appoint a receiver and had made no objection thereto. The bill alleged that the defendants had failed to keep the premises insured and had failed to pay certain taxes; that the frame building on the premises was in need of repairs; that the value of the premises, which was stated to be \$5,000, was insufficient to pay the amount due to complainant, together with costs. The allegations of the bill disclosed waste and insufficient or scant security, which, in the opinion of the court, fully warranted the appointment of a receiver. Under this state of facts the court held that the appointment of the receiver was not void but reversed the order and remanded the cause in order that the statute might be complied with.

That case, like Bothman v. Lindstrom, supra, is distinguishable from this, in the fact that the final decree of fore-

1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 26

closure had been entered before objection to the order was made. We cannot remand in this case because there is no cause here to remand. Moreover, while the trust deed here conveys the rents, issues and profits (and we do not assume to decide the rights of the complainant thereunder) the petition does not set up facts from which we can find that the premises here involved are scant security for the indebtedness.

McDougal v. Woods, *supra*, is not at all similar to this case, as the facts upon which the order there was based were fully set forth in the findings.

For the reasons indicated, the order must be reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

33423

S. C. WINTER,

Appellee,

vs.

LOUIS TORCH, MORRIS KAPLAN
and WILLIAM FELDMAN, Doing
Business as HYDE PARK GARAGE,
Appellants.

254 L.A. 616⁴
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover damages claimed to have been sustained by him on account of damage done his automobile, which he claimed to have left at the defendants' garage, and which they permitted to be taken from the garage without plaintiff's consent, as the result of which the machine was damaged. The case was tried before the court without a jury and at the close of the plaintiff's case, the defendants having failed to offer any evidence, the court found the issues in favor of the plaintiff and assessed his damages at the sum of \$1,100 and judgment for this sum was entered against the defendants and they prosecute this appeal.

The defendants' position was and is that since it appeared from the evidence that plaintiff's automobile was insured and since plaintiff was paid a part of the damages he sustained, by the Insurance company, the suit should have been brought in the name of the Insurance company, and that the court erred in excluding evidence tending to show that the automobile was insured. There is no merit in this contention. Eyalos v. Matheson, 243 Ill. App. 60, same case affirmed 328 Ill. 269; Allen v. Arnick Auto Renting Co. v. United Traction Co., 91 Misc. 631, 134 N.Y. S. 934; Yene v. Central Ill. Public Service Co., 286 Ill. 519; American Express Co. v. Haggard, 37 Ill. 465; Caspeid v. Chicago & N. W. Ry. Co., 283 Ill. App. 465.

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.

TO : SAC, NEW YORK (100-100000)

FROM : SAC, NEW YORK (100-100000) (P)
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In the Quoted case we said (p. 468): "In Dyala v. Matheson, 328 Ill. 209, where it was contended that the plaintiff having collected his loss from the insurance company could not maintain an action against the defendant, the Supreme Court said:

'The insurance company did not make the payment for the benefit of the appellant and the payment did not discharge the appellee's right of action against him. (American Express Co. v. Hazard, 37 Ill. 468.) If insured property is destroyed by the act of a wrongdoer, the owner of the property may sue the wrongdoer though the insurance company may have paid the loss. Voss v. Central Illinois Public Service Co., 236 Ill. 519.'

Complaint is also made that the court erred in deciding the case in favor of the plaintiff before hearing the evidence, and in this connection it is pointed out that during the course of the trial the court stated that if the defendants brought in fourteen men from defendants' garage who would testify that the car was not in the accident, he would not believe them. A further contention is that the court gave as much consideration in the trial of the case to the 18th Amendment to the United States Constitution, which was not involved, as he did to the merits of the case.

While the record discloses that the court made statements substantially as contended for by the defendants, yet it also discloses the fact that he told the defendants that if they had any witnesses to produce them on the witness stand. This they failed to do and obviously are not in a position to urge the complaint now made.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McBurely, P. J., and Hatchett, J., concur.

LEAD

35432

25444616 5

AMALGAMATED UNION OF OPERATING
ENGINEERS, a Voluntary Corporation,
Appellee.

vs.

WEST WEGLEWOOD TRUST & SAVINGS BANK,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$888.01 which it claimed to have deposited in defendant bank. The claim was made up of two items - one of \$800 and the other of \$88.01. There is no dispute about the latter. Plaintiff's contention was that the \$800 was wrongfully paid out by the bank. The case was tried by the court without a jury and there was a finding and judgment in favor of the plaintiff for the amount of its claim. The defendant seeks to reverse this judgment.

The only controversy in the case is concerning the \$800 item. The defendant's position was that the item of \$800 was paid out on November 28, 1927, by means of a check which was not signed by Albert Peterson, the business or general manager of plaintiff, and that his signature was necessary to render the payment of the check by the defendant proper.

The record discloses that on September 28, 1927, plaintiff opened an account with the defendant and deposited with the defendant a card bearing the authorized signature of Albert Peterson, general manager, and of Jean Gibson, secretary-treasurer of plaintiff. On the back of this card, which was produced on the trial by the defendant at plaintiff's request and introduced in evidence by the plaintiff, it appears that the account was opened by Mr. Uttsch, who was connected with the defendant bank. Peterson testified that he did not sign the \$800 check, and that sometime in

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RECEIVED BY THE DIRECTOR OF THE NATIONAL SECURITY AGENCY
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December, 1927, Peterson and other persons representing the plaintiff went to the defendant bank and advised officials of the latter that Gibson was no longer the secretary-treasurer of the company; that upon looking over the account with the bank officials at that time plaintiff's representatives pointed out that the payment of the \$800 by the defendant on the check of November 28th was unauthorized because Peterson had not signed it. Witnesses for the plaintiff gave testimony to the effect that Mr. Uttsch of the defendant bank thereupon went to the telephone and called Gibson, the former secretary-treasurer of plaintiff, and talked to him concerning the check and at the conclusion of this telephone conversation Uttsch told plaintiff's representatives that Gibson said Peterson had not signed the check and asked Uttsch to have Peterson come over to see Gibson and sign it, which Peterson refused to do. On cross-examination Peterson testified that the signature card above mentioned was brought to the witness by Gibson from the bank to obtain Peterson's signature and that Gibson said: "You will have to sign this card so that it will be proper, so that the bank will know that the check will be valid by these two signatures." Plaintiff also introduced in evidence six of its checks drawn on defendant bank, one dated August 30, one September 7, one September 12, one October 25, and two November 3, 1927, each of which bore the signatures of both Peterson and Gibson and each of them had been paid by defendant. The defendant offered no evidence.

The \$800 check was not produced. Peterson testified that he had never seen it. In ordinary course of business the cancelled check would be in the possession of plaintiff and should have been produced or the failure to do so accounted for. No question was asked as to where this check might be found. We think the court of its own motion should have gone into this question and demanded the production of the check or an explanation of the failure to

produce it.

The record is unsatisfactory. A number of points are made by counsel for the defendant in the brief filed, but no attempt has been made to comply with Rule 19 of this court not only in the statement of the case but in the brief of points and authorities. Here we find eight distinctly numbered points, but no point is made, the statement simply being "See Argument." Rule 19 requires that the points be concisely stated in the brief and that they be taken up and argued in the order in which they are made. If this rule is followed it will save the court a great deal of time.

The defendant contends that there is no evidence in the record tending to show that plaintiff's check on the defendant bank required the signatures of Peterson and Gibson. We think this is a misapprehension. The signature card which defendant required plaintiff to file at the bank on opening the account shows the signatures of Peterson and Gibson, and while it is not stated that these signatures are required on a check, that is the proper inference to be drawn; and further, the six checks above mentioned were signed by both. Moreover, as stated, Peterson on cross-examination testified that Gibson brought the card to him from the bank to obtain his signature "so that the bank will know that the check will be valid by these two signatures." No objection is made to this testimony, and we think it was proper. Practically all of the testimony offered by plaintiff through out the trial was objected to by the defendant, but we are of the opinion that most of the objections were entirely frivolous. We think that the bank should have brought its evidence into court so that the facts could be presented to the trial Judge, instead of making a defense based upon the merest technicalities.

Complaint is also made that the testimony received in

evidence, over defendant's objection, as to conversations had between plaintiff's representatives and the defendant's representatives was inadmissible on the ground that the latter's official connection with the bank was not sufficiently shown. We think this objection is entirely without merit. A bank acts through its representatives. The evidence is clear that plaintiff took the matter up with responsible representatives of the bank. Some of them testified, so that there is no denial of plaintiff's evidence and it was entirely competent.

Upon a careful consideration of all the evidence in the record, we are of the opinion that there is sufficient competent evidence to sustain the judgment, and there is none to the contrary. There is no dispute that the \$800 was deposited with the bank and paid out by defendant on a check, or that Peterson did not sign the check; and the card bearing the authorized signatures of plaintiff's officials shows that Peterson and Gibson were required to sign the checks. This is further shown by the several checks drawn by the plaintiff on the defendant bank and paid by the latter, all of which bore the signatures of both Peterson and Gibson. If the bank had any defence, it seems that it should have gone forward and produced evidence of such fact.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Katchett, J., concur.

33463

UNION COUNTY TRUST COMPANY
OF ELIZABETH, NEW JERSEY,
a Corporation,

Appellee.

vs.

CHARLES L. SCHWERIN,
Appellant.

2541A.617

APPEAL FROM SUPERIOR COURT
OF UNION COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the endorsee of five promissory notes, brought suit on them against the defendant, endorser of the notes. There was a special count upon each note and the common counts were added. Plaintiff also filed an affidavit of claim with the declaration, setting up the amount it claimed was due on the five notes and interest at six per cent per annum. In the declaration and affidavit of claim it was alleged that the notes were made and payable in New Jersey and that the legal rate of interest in that state was six per cent per annum.

The defendant filed a plea of the general issue with notice of special defenses, together with his affidavit of merits, which, after amendment, was, on motion of plaintiff, stricken. Defendant did not ask leave to further amend his affidavit of merits and therefore his plea was stricken, he was defaulted and judgment entered in plaintiff's favor for the amount of its claim. Defendant appeals; so that the question for decision turns on the sufficiency of the defendant's affidavit of merits.

The affidavit of merits sets up in substance that defendant had received no consideration for endorsing the notes; that there was an understanding between him and plaintiff before he endorsed the notes that he would be only secondarily liable for the payment of the notes; that plaintiff was to use all reasonable efforts to collect them before calling upon defendant; that plaintiff

failed and neglected to use all reasonable efforts to collect the notes before calling upon defendant; that "said notes were made, delivered, and were payable in the State of New Jersey, and that the law governing the rights of the parties hereto is under and by virtue of the laws of the State of New Jersey. Affiant denies that plaintiff is entitled to interest on said notes, or that he is indebted to the plaintiff in the sum of Thirteen Hundred Ninety-five (\$1395) Dollars, or in any sum whatsoever."

Defendant contends, as we understand the argument of his counsel, (1) that the court erred in striking his affidavit of merits in that he should have been permitted to prove as a question of fact what the laws of the State of New Jersey were; and (2) that it was error to include interest. We think neither of these contentions can be sustained. It is not sufficient, as a matter of pleading, to allege that the rights of the parties were governed by the laws of New Jersey, but the affidavit should have further set up what the laws of New Jersey provided. The affidavit in this respect was clearly insufficient.

Since plaintiff in its declaration and in its affidavit of claim set up that the notes were made and were to be paid in New Jersey and that under the laws of that state the legal rate of interest was six per cent per annum, and since the court struck the defendant's plea, the allegation of the declaration stood admitted; therefore it is clear that plaintiff was entitled to interest at the rate of six per cent, although the notes mentioned no interest. The allegation of plaintiff's declaration was that under the laws of New Jersey such notes bore interest at six per cent per annum.

Obviously there was no merit in that part of defendant's affidavit of merits in which it was averred that defendant had not personally received any consideration for signing the notes, and that before he did so there was an understanding between him and plaintiff

that defendant would be only secondarily liable, because this allegation would violate the parol evidence rule, and of course this could not be done.

Plaintiff contends that the appeal is clearly frivolous and prosecuted solely for delay, and therefore it should be awarded damages as provided by statute. Upon a careful consideration of the entire record and the argument made by defendant's counsel, we are unable to say that the appeal has been prosecuted solely for the purpose of delay. Therefore plaintiff will not be awarded damages.

The judgment of the Superior court of Cook county is affirmed.

APPROPRIATE.

McSurely, P. J., and Matchett, J., concur.

33462

H. WAGNER,
Appellee,

vs.

ZIFF BROTHERS, a
Corporation,
Appellant.

254 I.A. 317

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$1050.00 for a sandblasting machine which he claimed to have sold and delivered to defendant and \$537.70, which was the cost of moving the machine from Chicago to Marion, Indiana. In his statement of claim plaintiff averred that he had been paid \$255. The defendant filed an affidavit of merits admitting its liability for the proper cost of removing the machine but denied any liability for the machine. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$1391.00. This appeal follows.

The record discloses that defendant conducted a large business plant in Chicago and that it used a considerable number of bottles in its business, which it wanted to have sandblasted. With this end in view it got in touch with plaintiff's brother and a written agreement was entered into between defendant and the brother on December 22, 1926, whereby the brother was to build a sandblasting machine and sand blast 1,000 gross of bottles for defendant, for which he was to be paid a certain consideration. The sandblasting machine was built in defendant's plant and the written contract was, by agreement, turned over to plaintiff, who proceeded to carry it out. The machine, after it was installed, was operated in defendant's plant for a number of months and nearly 400 gross of the bottles were sandblasted. Afterwards, by agreement, the machine was moved from defendant's plant to plaintiff's place of business, where the sandblasting of the bottles was

continued. Apparently the sandblasting machine did not operate as satisfactorily as both parties had expected. The evidence further shows that defendant was purchasing the bottles from a concern located at Marion, Indiana, and defendant thought it could save money in the way of freight charges, etc., by having the bottles sandblasted at Marion and with this in mind they proposed to plaintiff that he remove the machine from Chicago to Marion, install it there, and defendant would pay the cost of removal and installing; and in case the company in Marion did not buy the sandblasting machine from plaintiff, the defendant would do so. This was agreed upon and defendant removed and installed it there. Some bottles were there sandblasted. Plaintiff then wanted pay for the machine and for the cost of removing and installing it. Defendant paid \$255 on account of the cost of removal but refused to pay for the machine because it contended the machine would not sandblast 30 gross of bottles per day, and that this was a condition precedent to any obligation on its part to purchase the machine. The defendant's position is that the plaintiff guaranteed that the machine when installed at Marion would sandblast 30 gross of bottles per day and that since it would not sandblast that number, or anything near that number, there was no liability. Plaintiff denied that he had guaranteed that the machine would sandblast 30 gross of bottles per day, and there was evidence tending to show the number of bottles it would sandblast per day. Witnesses on behalf of defendant gave testimony tending to sustain its version of the contract.

The court saw and heard the witnesses testifying and found in favor of the plaintiff; unless we can say that the finding is against the manifest weight of the evidence, we are not warranted in disturbing the finding. We have carefully considered all the

evidence in the record and are of the opinion that there was no guarantee as defendant contends. The most that can be said is that the parties hoped and expected that the machine would turn out 20 gross of bottles per day. The machine had been operated in defendant's plant in Chicago for a number of months and it had also been operated afterwards in Chicago at plaintiff's place of business. A witness for the defendant testified that it had been operated for about a year and a half in Chicago. In view of this evidence we think defendant ought to have known the approximate capacity of the machine.

The defendant further contends that the itemized bill presented to it by plaintiff, showing the cost of the removal, was padded and therefore the court should not have allowed the full amount of plaintiff's claim for this item. Plaintiff testified with reference to the cost of removing the machine to Marion and installing it there. No testimony was offered by defendant contradicting this testimony and upon a careful consideration of it we are unable to say that the finding of the court for this item is against the evidence.

There was also a dispute as to the amount the defendant should be required to pay for the machine in case the court held it liable. Testimony was offered on behalf of the defendant to the effect that plaintiff had asked only \$500 for it, while the court allowed \$1050.00. Evidence offered on behalf of plaintiff tended to show that the \$500 mentioned for the machine was not for the entire outfit - that in addition to the machine proper there was an air compressor valued at \$450, storage tank at \$60 and belting at \$10.00.

Upon a consideration of all the evidence in the record, we think we would not be warranted in disturbing the

finding and judgment of the trial court on either of the items.
The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., dissents.

Hatchett, J., concurs.

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33880

ARTHUR W. RANCE, HENRY B. RANCE
and ROBERT F. RANCE, Doing Business
as The Prudential Realty Company,
Appellants,

vs.

EDITH A. WALLIN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'COMMON DELIVERED THE OPINION OF THE COURT:

Plaintiffs brought suit against the defendant to recover \$300 claimed to be due for real estate brokers' commissions for obtaining a purchaser for a piece of real estate in Chicago, alleged to belong to defendant. The case was heard before the court without a jury and there was a finding and judgment in defendant's favor and plaintiff's appeal.

Plaintiffs in their statement of claim allege that the defendant owned property at 1720 Archer avenue, Chicago, and had employed plaintiffs as real estate brokers to obtain a purchaser for it; that they obtained such a purchaser but the sale was not consummated; that after obtaining the purchaser plaintiffs learned for the first time that the defendant and another person each owned an undivided one-half interest in the premises and that they refused to carry out the deal.

The evidence shows that defendant's mother owned the premises in question and died intestate. Defendant was appointed administratrix of the estate. She desired to sell the property which was owned by herself, her sister and her brother; that defendant requested the plaintiffs to sell the property, which they proceeded to do. Witnesses for the plaintiffs gave testimony to the effect that at the time the property was listed defendant told them the reason she wanted to sell immediately was that her sister,

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her brother and herself needed money, and that plaintiffs had examined the plat books and knew that the property belonged to the defendant's mother, who had died intestate. The evidence further shows that plaintiffs obtained a purchaser ready, able and willing to purchase upon the terms proposed and a contract was prepared wherein defendant was named as the owner of the premises; that when this contract was presented to her for signature she told plaintiffs that the property belonged to the estate and that she was administratrix of it, and plaintiffs thereupon suggested that defendant sign it as administratrix, which she accordingly did; that afterwards, when an attorney examined the contract he stated that it was not in proper form because the premises were owned by the three heirs and a new contract was drawn up, providing for the sale of the premises by the three heirs. This contract was signed by the purchaser but the heirs, the owners of the property, refused to execute it.

Plaintiffs contend that under the law defendant is liable to them for commissions, she having held herself out as the owner of the property and plaintiffs having secured a purchaser for the property at her request, and that the words written by defendant after her name, "Administratrix of Estate," when she signed the contract, were purely words of description of the person and added nothing to the contract.

In the instant case it is undisputed that all of the parties to this suit knew that the defendant did not own the property but only an undivided interest in it. In Quinlan et al. v. Towle, 185 Ill. App. 522, it was held that where one contracts to sell real estate that he does not own, he may become liable for commissions to the broker who secures a purchaser for it; but that where the broker assists his principal in making such a contract when he

knows that the principal has no power to carry it out no recovery can be had. We think that case is in point here. Plaintiff's knew from the very beginning that the defendant did not own the premises and therefore could not convey them.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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JENNIE J. SILBERMAN,
Appellee,

v.

HARRY SHRAIBERG,
LOUIS T. VOLIN and
JACK BRODSKY,
Defendants.

LOUIS T. VOLIN,
Appellant.

INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, Louis T. Volin, seeks to reverse an order entered by the Circuit Court of Cook County July 11, 1929, enjoining the defendants and all persons claiming through or under them, until the further order of court, "from leasing or permitting to be used the store known as No. 1137 South State Street, Chicago, Illinois, as a restaurant or fountain luncheonette." The order was entered on complainant's verified bill as amended and the report of a master in chancery, neither of the defendants having filed any pleading.

The substance of the allegations of the bill as amended is that complainant and defendants, Harry Shraiberg and Louis T. Volin, on September 19, 1928, entered into a written lease whereby Shraiberg and Volin demised to complainant the store known as 1137 South State street, Chicago, to be occupied by complainant "for a restaurant or fountain luncheonette" for a period of ten years commencing October 1st, 1928. The lease contained the following:

"Lesser covenants and agrees that he (they) will not, during the term of this lease, demise or lease all or any portion of the building of which the demised premises are a part for the purpose of employing the same or any portion thereof as a restaurant or fountain luncheonette."

1. The first part of the report is a summary of the work done during the year. It is divided into two main sections: a general summary and a summary of the work done in each of the departments.

2. The second part of the report is a detailed account of the work done in each of the departments. It is divided into four main sections: the Department of Agriculture, the Department of Commerce, the Department of Education, and the Department of Health.

3. The third part of the report is a summary of the work done in each of the departments. It is divided into four main sections: the Department of Agriculture, the Department of Commerce, the Department of Education, and the Department of Health.

The Bill further alleged that the building was being erected and that afterwards complainant entered into possession and was conducting a restaurant in the store room 1133 South State street; that she had spent a large amount of money in installing the necessary trade fixtures; that the landlords, contrary to the covenant above quoted, demised to the defendant Brodsky, the store known as 1137 South State street, which was in the same building as complainant's store; that Brodsky caused signs to be put on the windows of the store advertising the fact that the business to be conducted by him would be a delicatessen and fountain lunch and that he was then engaged in installing fixtures for the purpose of conducting a restaurant and fountain luncheonette; that at the time Brodsky leased the store and at the time he put up the signs in the windows he knew that complainant was conducting a restaurant and fountain lunch at 1133 South State street and knew of the covenant in complainant's lease above quoted; that complainant believed that Brodsky, unless restrained, would establish and operate a restaurant and fountain luncheonette in the store in question which would greatly damage complainant financially; that the amount of rent which plaintiff was required to pay under her lease was fixed in consideration of the fact that no other restaurant would be conducted in the building and that complainant had performed all the agreements and covenants on her part.

The prayer was that a temporary writ of injunction be issued upon the filing of the bill enjoining the defendants from using the store 1137 South State street as a restaurant or fountain luncheonette and that upon a hearing the injunction was made permanent. There was also a prayer for general relief.

May 16, 1929, on motion of the solicitor for the defendants, the cause was referred to a master in chancery who

IN SENATE, JANUARY 1, 1901.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE.

ALBANY: JAMES B. LEECH, 1899.

THE CITY OF NEW YORK.

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IN SENATE, JANUARY 1, 1901.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE.

ALBANY: JAMES B. LEECH, 1899.

THE CITY OF NEW YORK.

IN SENATE, JANUARY 1, 1901.

took evidence on the question whether the defendant, Brodsky, had notice of the restrictive covenant in complainant's lease. The master found that Brodsky had such notice. He further found that on April 6, 1929, the landlords and Brodsky entered into a lease whereby the store 1137 South State street was demised to Brodsky for a period commencing April 15, 1929, and expiring April 14, 1932; that the lease contained the following:

"The lessee expressly covenants and agrees that he will not use or allow the use of all or any portion of the demised premises as a restaurant and/or as a fountain luncheonette."

The master further found that immediately after the execution of the lease, Brodsky posted a large cloth sign on the premises announcing that about April 15 he would open up a "first class delicatessen, light groceries and bakery goods;" that Brodsky also caused to be placed in permanent form, gold raised letters on the premises which stated that Brodsky conducted a "Fountain Service," in the store. He had installed fixtures for that purpose and began to carry on a regular business shortly after April 15, 1929. The evidence taken by the master was returned with his report but is not in the record before us. Defendants interposed objections and exceptions to the report but they were overruled and the order appealed from entered.

From this order the defendant Volin alone appeals under the statute by filing his bond with the clerk of the court. He contends, (1) that the order appealed from is wrong because it enjoined the defendants from executing a lease, while the record discloses that the lease had been executed before the bill was filed, (2) that there being no averment in the bill that the lessors were about to lease the premises to any person other than the defendant Brodsky, the injunction should not be issued restraining the defendant Volin "generally from leasing" the

premises for the purpose forbidden in complainant's lease; (3) the covenant in complainant's lease not to "demise or let" the premises for a restaurant does not forbid Volin, the owner, from using it for such purpose himself, but the injunctional order restrained Volin from using the premises for restaurant purposes; and (4) the injunctional order should have fixed the time within which complainant should file its bond.

A reading of defendants' contentions will at once disclose the fact that they are exceedingly hypercritical and we think altogether without merit. While it would have been more accurate had the order enjoined the defendant Brodsky from occupying the premises for restaurant purposes, the lease to him already having been executed, yet we think upon a consideration of the whole record it is clear that the purpose of the bill was to prevent the premises from being used for restaurant purposes by Brodsky. The question whether Volin, one of the landlords, could himself use the premises for a restaurant is not in the case. It was not considered in any manner by any one.

The record discloses that complainant filed his bond immediately upon the entry of the order appealed from. It is obvious that the court was apprised of this fact because he approved the bond so that it was unnecessary to state in the order, the time within which the bond should be filed.

Under the covenant of complainant's lease, it was the duty of the landlords to see that no other restaurant was conducted in the building by any ^{tenant} other than complainant and it could not free itself from such obligation by merely inserting in Brodsky's lease a provision to that effect. University Club v. Beakin, 265 Ill. 257.

The order appealed from is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25 MAY 1929

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 2 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The Appellate Court
of Illinois

Second District.

May Term, A. D. 1929.

A. B. Booth,

appellant,

vs.

Appeal from the Circuit Court

of Bureau County.

Ray Gore and Andrew

Wagner,

appellees,

OPINION by BOGGS, J.

Appellant instituted a suit in trespass against appellees in the Circuit Court of Bureau County. The declaration consisted of two counts. The first count charges that on October 30, 1926, appellees "had in their possession and custody one pony or small horse; that on the night of the day aforesaid, to-wit, at 10:15 in the evening, said pony was running at large on a public highway in the county aforesaid, and ran or walked in front of the automobile of the plaintiff, of the value of \$1,500, so that said automobile of the plaintiff struck said pony with force and violence, and then and there greatly broke, damages, " etc., said automobile. The second count charges that on the day aforesaid, "said pony or small horse, with force and arms, etc., in the county aforesaid, walked, ran trotted or stepped in front of and against a certain automobile of the plaintiff, of the value of \$2,000, in which said last-mentioned automobile the plaintiff was then and there riding in and along the highway there, and thereby then and there greatly broke, damaged and spoiled the said automobile, etc., * * * to the great damage of the plaintiff and against the peace of the people of the State of Illinois," etc.

To said declaration, appellees filed a general demurrer,

In the County Court

of Illinois

May Term, A. D. 1932.

A. F. Booth,

Appel from the Circuit Court

of Bureau County.

Ray Gore and Andrew

OPTION BY ROGERS, J.

Appellant instituted a suit in trespass against appellee in the Circuit Court of Bureau County. The declaration contains of two counts. The first count charges that on October 30, 1932, appellee "had in their possession and custody one pony or small horse; that on the night of the day aforesaid, to-wit, at 10:15 in the evening, said pony was running at large on a public highway in the county aforesaid, and ran or walked in front of the automobile of the plaintiff, of the value of \$1,500, so that said automobile of the plaintiff struck said pony with force and violence, and then and there greatly broke, damaged, etc., said automobile. The second count charges that on the day aforesaid, "said pony or small horse, with force and arms, etc., in the county aforesaid, walked, ran trotted or stopped in front of and against a certain automobile of the plaintiff, of the value of \$2,000, in which said last-mentioned automobile the plaintiff was then and there riding in and along the highway there, and thereby then and there greatly broke, damaged and spoiled the said automobile, etc." To the great damage of the plaintiff and against the peace of the people of the State of Illinois, etc. To said declaration, appellee filed a general demurrer.

which was sustained. Appellant electing to abide his declaration, judgment was entered thereon, in bar of action and for costs. To reverse said judgment this appeal is prosecuted.

Appellant insists in his brief and argument that "by section 36 of our Practice act, the distinction between the action of 'trespass' and 'trespass on the case' has been abolished. In all cases where trespass or trespass on the case has been heretofore the appropriate form of action, either of said forms may be used, as the party bringing the action may elect."

While the statute does away with the technical distinction between the forms of action of trespass and case, it does not affect the substantial rights and liabilities of parties, and the averments and proof necessary to sustain either cause of action are the same as at common law. *BBalock v. Randall*, 76 Ill. 224-228; *Chicago Title & Trust Co. v. Core*, 223 Ill. 58-63. Notwithstanding said statute, a count in case must still contain all the elements necessary to state a good cause of action in case, and a count in trespass must, in like manner, contain all the elements necessary to state a good cause of action in trespass. *Pike v. Heinzmann*, 89 App. 642-644.

The action of trespass lies only for wrongs immediate and committed with force, express or implied. *Chitty on Pleading*, 13th Am. ed. Vol. 1, p. 165; *Wright v. C. & W. R. R. Co.*, 7 App. 438-445; *Puterbaugh*, 10th ed., sec. 325.

Counsel for appellant evidently assumes that the owner of an animal running at large is liable in trespass for an injury resulting therefrom, the same as he would be liable in an action of trespass as to real estate invaded by such animals. This rule is confined to suits brought for trespass to real estate. This was also true at common law. Where, however, as here, the owner of the animal in question is not responsible for the alleged injury, except consequentially, the action must be

which was sustained. Appellant objecting to said his decision
tion, judgment was entered thereon, in favor of action and
for costs. He reverses said judgment and this appeal is presented.
Appellant insists in his brief and argument that "the section
30 of our Practice Act, the distinction between the action of
'trespass' and 'trespass on the case' has been abolished. In
all cases where trespass or trespass on the case has been here-
before the appropriate form of action, either of said forms may
be used, as the party bringing the action may elect."
While the statute goes away with the technical distinction
between the forms of action of trespass and case, it does not
affect the substantial rights and liabilities of parties, and
the arguments and proof necessary to sustain either cause of
action are the same as at common law. *Wheeler v. Randall*, 100 Ill.
224-228; *Chicago Title & Trust Co. v. Stone*, 222 Ill. 52-53.
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committed with force, express or implied. *Whitty on Torts*,
1881, § 111, p. 111.
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an animal running at large is liable in trespass for an injury
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action of trespass as to real estate invaded by such animal.
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This was also true at common law. Where, however, as
here, the owner of the animal in question is not responsible for
the alleged injury, except contingently, the action must be

in case. *Stumps v. Kelly*, 22 Ill. 140; 3 Cor. Jur. 108; *Chitty's Pleading*, 13th ed. vol. 1, p. 127; *Puterbaugh*, 10th ed. sec. 670-673.

We are in this opinion following the holding of this court in *Farrell v. Crawford*, 222 App. 499, at page 502, where we said: "every animal of the species named by the statute of 1895, chapter 8, is running at large if it is upon the public highway, unattended, unrestrained and uncontrolled, and this whether or not such animal is upon the highway with the knowledge and permission of the owner or custodian."

There are no averments in the declaration that the owner of said animal had any knowledge that it was running at large, but that is not necessary.

Both counts of the declaration, are insufficient, as neither charges negligence on the part of the owner of said animal, and neither of said counts alleges due care on the part of appellant. The second count does not charge a trespass on the part of appellee, but a trespass with "force and arms" by said pony. There is no direct connection between the alleged assault of said pony and the owner of the same.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 I.A. 518²

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 5- 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois,
Second District.

May Term, A. D. 1929.

The People of the State
of Illinois,

Defendant in error,

vs.

Error to the County Court of
Ogle County.

Anthony Fiorenza, alias John Doe,
Plaintiff in error,

Opinion by Boggs, J.

Plaintiff in error was tried and convicted under the second count of an information filed in the County Court of Ogle County, charging the unlawful manufacture of intoxicating liquor, without a permit from the Attorney General, etc. Plaintiff in error was sentenced to the Illinois State Farm at Vandalia for a period of six months, and was fined \$1000, and ordered committed until the fine and costs were paid. To reverse said judgment, this writ of error is prosecuted.

On June 9, 1928, one H. Baumgartner filed a complaint for a search warrant of certain buildings, etc., located on a farm referred to as the "Paul Millis farm" in said county. The affidavit set forth that the affiant "has just and reasonable grounds to believe and does believe that intoxicating liquor is now unlawfully possessed, kept for sale, sold, disposed of and manufactured by a person or persons whose name or names is or are unknown to affiant without a permit from the Attorney General of the State of Illinois, in violation of the Illinois Prohibition Act of this state, and certain mash, still and other property designed for the illegal manufacture of liquor is possessed in, to-wit: At and within a certain frame building of residence construction, basement thereunder

In the Supreme Court

of Illinois

Second District

At St. Louis, Mo., June 1, 1928.

The People of the State

of Illinois,

Defendant in error,

vs.

Opia Company,

Plaintiff in error.

Presented by counsel,

Opia Company, by counsel,

Plaintiff in error was tried and convicted under the second count of an indictment filed in the County Court of Cook County, Illinois, charging the unlawful manufacture of intoxicating liquors, without a permit from the Attorney General, in the County of Cook, Illinois, and was fined \$1000, and costs were paid. To reverse said judgment, with writ of habeas corpus and costs were paid. To reverse said judgment, with writ of habeas corpus and costs were paid. To reverse said judgment, with writ of habeas corpus and costs were paid.

On June 2, 1928, the People of the State of Illinois, by and through their Attorney General, filed a complaint for a writ of habeas corpus in the County Court of Cook County, Illinois, charging the unlawful manufacture of intoxicating liquors, without a permit from the Attorney General, in the County of Cook, Illinois, and was fined \$1000, and costs were paid. To reverse said judgment, with writ of habeas corpus and costs were paid. To reverse said judgment, with writ of habeas corpus and costs were paid.

and all outbuildings appurtenant thereto, the same being a part of the group of buildings known as the farm buildings on the Paul E. Millis farm, said group of buildings being situated east of the Rock River and near to the section line running north and south between Section 25, Marion Township, and Section 29, Byron Township, * * * and that the following are the reasons for such belief to-wit, that affiant for the past six years has known the odor which comes from a moonshine whisky still in operation, the odor which comes from fermenting alcoholic mash, and, the odor of moonshine whisky, through during said period of his employment as a prohibition investigator of his having seen constantly such stills in operation, alcoholic mash fermenting, and seeing and handling moon-whine ~~whisk~~ whisky; that on the 9th day of June, 1928, while affiant was within a few feet from said building he smelled the odor of a moonshine whisky still in operation, the odor of fermenting alcoholic mash and the odor of moonwhine whisky coming directly from said building there.

"Wherefore, he prays that a search warrant may issue,"
etc.

A warrant was issued and delivered to the sheriff, who made a raid on the premises and seized 255 gallons of intoxicating liquor, with the vessels containing the same, one iron boiler, eighteen horsepower size; one iron cooler with copper coil; one copper rectifier, one copper still about 300 gallon capacity, three copper tanks of about fifty gallon capacity, three copper tanks of about eighty gallon capacity, two pressure gauges, one recording thermometer, one set of plumber's tools, about 900 pounds of copper, brass and iron pipe fittings, one iron tank with faucet, about 250 gallon capacity, one hand operated pressure pump, and 120 tin cans of one gallon capacity each. On the trial of said cause, a portion of said liquor, etc., was offered and admitted in evidence over objection.

No question is raised as to the guilt of plaintiff in error. While numerous errors are assigned, only two are argued, the first being that the court erred in not granting the petition of plaintiff in error to impound said liquor, vessels, implements, etc., seized under said search warrant; the second being that the court erred in admitting said liquor, etc., in evidence on said trial. The sole question, therefore, for our determination is as to whether said affidavit was sufficient to authorize the issuance of said search warrant.

Counsel for plaintiff in error contend that the "finding of the existence of 'probable cause' cannot be based upon an affidavit upon information and belief."

An examination of the affidavit discloses that it is not made on information, and is in substantial compliance with the provisions of sections 29 and 30 of the Illinois Prohibition Act. This point is therefore not well taken. *People v. Zalapi*, 321 Ill. 484-494; *People v. Daugherty*, 324 Ill. 160-161. However, in *People v. Zalapi*, supra, 392, the supreme court held that a complaint based on information and belief was sufficient, if the facts on which the information and belief were based, "together with the other part of the complaint, clearly and conclusively shows that a crime has been committed, if such facts are true."

It is next insisted that the averment in the affidavit that the affiant "detected the odor of a moonshine whisky still in operation and the odor which comes from fermenting alcoholic mash, and the odor of moonshine whisky," was a mere conclusion.

That alcoholic mash and whisky may be detected by the odor thereof, is held by the supreme court in *People v. Lavendowski*, 329 Ill. 223. At page 230 the court says:

"The complaint upon which the search warrant was issued set forth that the affiant was familiar with the odor of fermenting grain mash used in the manufacture of intoxicating liquor commonly called hootch, or home-made whiskey; that he smelled that odor and

The question is raised as to the right of admission to the

While numerous errors are suggested, only two are material, the first being that the court erred in not granting the motion of plaintiff in error to improve said lower, secondly, the court erred in admitting said lower, etc., in evidence on said trial. The sole question, therefore, for our determination is as to whether said affidavit was sufficient to authorize the issuance of said search warrant.

It is contended that the "affidavit" in error contained that the "existence of" probable cause could not be shown upon an affidavit upon information and belief.

In examination of the affidavit it appears that it is not made on information, and is in substantial compliance with the provisions of sections 29 and 30 of the Illinois Constitution. This point is therefore not well taken. People v. Kasper, 221 Ill. 484-491; People v. Dammert, 224 Ill. 150-151. However, in People

It is next insisted that the affidavit in the affidavit that the officer "detected the odor of a noxious substance while in operation and the odor which comes from fermenting alcohol is such a crime has been committed, if such facts are true."

It is next insisted that the affidavit in the affidavit that the officer "detected the odor of a noxious substance while in operation and the odor which comes from fermenting alcohol is such a crime has been committed, if such facts are true."

That alcoholic mash and whisky may be detected in the odor thereof, is held by the supreme court in People v. Kasper, 221 Ill. 484-491. At page 230 the court says: "The complaint upon which the search warrant was issued set forth that the defendant was familiar with the odor of fermenting grain mash used in the manufacture of intoxicating liquors commonly called 'hooch', or home-made whisky; that he smelled the odor and

knew that it emanated from the premises occupied by the plaintiff in error. If there is reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, it is a sufficient basis for the issuance of a search warrant. (People v. Daugherty, 324 Ill. 160.) Information obtained by an affiant by the sense of smell may constitute a sufficient showing of probable cause to authorize the proper officer to issue a warrant to search for intoxicating liquors. (Commonwealth v. Diebold, 202 Ky, 315; Dolan v. Commonwealth, 203 id. 400; McBride v. United States, 284 Fed. 416; People v. Flaczinski, 223 Mich, 650; Blakemore on Prohibition, 2nd ed -- p 419.)"

It is also insisted that the affidavit should have averred that said liquid was fit for beverage purposes. This is not necessary. People v. Berglin, 309 Ill. 488-491; People v. Cioppi, 322 Ill. 353-362; People v. San Fillippo, 243 App. 146, 148-149; People v. Lull, 246 App. 53-56.

It is also insisted that, although whiskey and certain other liquors are held as a matter of law to be intoxicating liquors, when the qualifying term "moonshine" is added thereto, that rule no longer obtains, and it must be alleged and proved that moonshine whiskey is intoxicating. This point is not well taken.

It is also insisted that the allegation to the effect that said liquor was unlawfully manufactured, etc., without a permit from the Attorney General, is not sufficient.

"A complaint for a search warrant is to be regarded as sufficient to authorize the issuance of a search warrant when the facts therein stated and sworn to show probable cause for the writ. It is not required that the complaint for a search warrant should show beyond a reasonable doubt that the writ should issue." People v. DeGeovanni, 326 Ill. 230-234.

Said complaint alleges that said still, liquors, etc., were

located on a farm, off of the main road, and under surroundings clearly disclosing an attempt to carry on the business of said manufacture without the knowledge of the public. The facts and circumstances with reference to the location of the still, liquors, etc., as disclosed by the affidavit, were clearly sufficient upon which the justice of the peace or police magistrate might base his conclusion that a still was possessed and liquors were being manufactured, without permission of the Attorney General. *People v. DeGeovanni*, supra, 239; *People v. Tate*, 316 Ill.

On the proposition made by counsel for plaintiff in error that, taking the affidavit as a whole, it was not sufficient to authorize the issuance of a search warrant, we think the observations of the supreme court in *People v. Daugherty*, supra, are quite applicable. In that case, it was contended the evidence was not sufficient to show probable cause. The complaint set forth that intoxicating liquor was unlawfully kept, etc., and stated, as ground therefor, that the affiant "has been inside said barn and saw a jug of wine and a keg of wine, and tasted said wine in the keg, and which said wine was intoxicating, the same containing more than one half of one per cent of alcohol by volume." At page 163, the court says:

"The evidence before the magistrate showed that the wine was kept in a jug and in a keg, in a barn owned by plaintiff in error, which barn was on a lot back of a restaurant and a pool-hall. All these were competent facts to be considered by the magistrate in determining whether there was reasonable ground to believe that the intoxicating liquor was kept on the premises of plaintiff in error for an illegal purpose. We are of the opinion that the circumstances of the possession were sufficiently strong to induce the belief in the mind of a reasonably cautious person that these liquors were being held for an unlawful purpose. It is not reasonable to assume that a person would keep liquors for sacramental purposes, for medicinal purposes, or for any other purpose authorized

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by law, in a barn back of a public restaurant and a pool-hall."

Following the rule laid down in *People v. Daugherty*, supra, we are of the opinion that the facts and circumstances set forth in said complaint authorized the issuance of said warrant.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

50 A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 LA. 618³

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 5- 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois
Second District.
May Term, A. D. 1929.

The People of the State
of Illinois,

Defendant in error,

Vs.

Error to the County Court of
Ogle County.

Albert Caruso, alias John Doe,

Plaintiff in error,

Opinion by Boggs, P. J.

Plaintiff in error was tried and convicted under the second count of an information filed in the county court of Ogle county, charging the unlawful manufacture of intoxicating liquor, without a permit of the Attorney General, etc. Plaintiff in error was sentenced to the Illinois State Farm at Vandalia for a period of six months, and was fined \$1000 and ordered committed until the fine and costs were paid. To reverse said judgment this writ of error is prosecuted.

The record, assignment of errors, and the questions raised and argued for a reversal in this case are the same as in People v. Anthony Fiorenza, alias John Doe, General No. 8001, Agenda No. 39 of this Court. For the reasons set forth in the opinion in that case, the judgment of the trial court in this case will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

5/a A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 I.A. 618⁴

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 5 - 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

General No. 8003

Agenda No. 41.

In the Appellate Court
of Illinois

Second District.

May Term, A.D. 1929.

The People of the State
of Illinois,

Defendant in error,

Error to the County Court

vs.

of Ogle County.

Jasper Curcia, alias John Doe,

Plaintiff in error,

Opinion by Boggs, P. J.

Plaintiff in error was tried and convicted under the second count of an information filed in the county court of Ogle county charging the unlawful manufacture of intoxicating liquor, without a permit of the Attorney General, etc. Plaintiff in error was sentenced to the Illinois State Farm at Vandalia for a period of six months, and was fined \$1000 and ordered committed until the fine and costs were paid. To reverse said judgment, this writ of error is prosecuted.

The record, assignment of errors, and the questions raised and argued for a reversal in this case are the same as in People v. Anthony Fiorenza, alias John Doe, General No. 8001, Agenda No. 39, of this Court. For the reasons set forth in the opinion in that case, the judgment of the trial court in this case will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 LA 618⁵

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 5- 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois

Second District.

May Term, A. D. 1929.

Fred Franzmeier,

appellee,

vs.

Appeal from the County Court of

Jo Daviess County.

L. D. Brown,

appellant,

Opinion by Boggs, J.

On July 8, 1928, a collision occurred between an automobile belonging to appellee and driven by his son, and an automobile driven by appellant on state route 5. Both of said cars were damaged by said collision. Suit was instituted by appellee against appellant before a justice of the peace of Jo Daviess County, to recover for the damages to his car. From the judgment rendered by the justice, an appeal was taken to the county court, where a trial was had, resulting in a verdict and judgment in favor of appellee for \$208.00. To reverse said judgment, this appeal is prosecuted.

It is contended by appellant that the verdict of the jury is against the manifest weight of the evidence. The abstract filed by appellant does not set forth the motions for a new trial or in arrest of judgment, and the rulings of the court thereon, although the record discloses that the motion for a new trial was in writing, with eleven specifications. Under rule 16 of this court, the abstract must be sufficiently complete to cover all the points assigned as error. "The court will not explore the record itself to find errors to sustain the assignment of errors." *People v. Yuskauskas*, 268 Ill. 328; *Jackson v. Winans*, 287 Ill. 383-386. To the same effect is *Village of Des Plaines v. Winkelmann*, 270 Ill. 149; *People v. Raboin*, 316 Ill. 65-76.

In the Appellate Court

of Illinois

Second District

May Term, A. D. 1929.

Appeal from the Circuit Court of
the County of Cook.

vs.

Appellant.

Opinion by Rogers, J.

On July 8, 1928, a collision occurred between an automobile

belonging to appellee and driven by his son, and an automobile

driven by appellant on state route 8.

Damage by said collision. Suit was instituted by appellee and

appellee before a Justice of the Peace of the County of Cook, to

recover for the damage to his son. From the judgment rendered by

the Justice, an appeal was taken to the County Court, where a

was had, resulting in a verdict and judgment in favor of appellee

for \$208.00. To reverse said judgment, appellant has presented

It is contended by appellant that

against the manifest weight of the evidence.

by appellant does not set forth the motions for

arrest of judgment, and the finding of the Court, which

the record discloses that the motion for a new trial was withdrawn.

with eleven specifications. Under this it is held that the

All the points presented as

error. The court will not explore the record itself to find errors

to sustain the assignment of error. See *People v. Thompson*, 203 Ill.

People v. Wilson, 237 Ill. 688-690. In the case at bar it is

People v. Wilson, 237 Ill. 688-690; *People v. Wilson*, 237 Ill. 688-690.

Reversed, Ill. App. Ct. 2d Dist.

The abstract of the record is the pleading of the party seeking to have such record reviewed upon appeal or by writ of error, and the error relied upon to effect the reversal of the judgment must be made to appear by such abstract. *People v. Paul*, 167 App. 557-559; *McGovern v. City of Chicago*, 202 App. 139-145, citing *Gage v. City of Chicago*, 211 Ill. 109.

The sufficiency of the evidence to support the verdict is therefore not before us for consideration, and we would be warranted in not considering this assignment of error. *Gabler v. City of Mattoon*, 167 Ill. 18; *Jackson v. Winans*, supra, 386; *People v. Raboin*, supra, 76. We have, however, deemed best to do so.

The collision in question happened about 7:30 or 8 o'clock P. M. on July 8, 1928. Route 5 at the point where the collision occurred runs in a straight line. Appellant had been to Galena and had driven west on said route 5 to a point where there is a road running south, referred to by the witnesses as the Frentress Lake road. Appellant testified that he turned into said road for the purpose of turning around and driving back to Galena.

Edwin Franzmeier, the driver of appellee's car, testified: "As I approached the Frentress Lake intersection I saw Mr. Brown about 900 feet away. He was making the turn south into the Frentress Lake lane. He next backed across Route 5 with his hind wheels off the pavement. The front wheels back of the front line. He paused quite a length of time. When I reached a distance of nearly twenty feet of the car he pulled out abruptly before me. I whistled when I was quite a distance, and slowed my car when he was backing across the pavement. When I was eighty feet from him I sounded the horn a second time. I put on my brakes as hard as I could; it was impossible to get by on either side."

On cross examination, this witness testified that he had been driving at about forty miles per hour; that he had slowed down and was going about twenty miles an hour when the cars collided.

Appellant testified: "When we came to the Prentress Lake road that evening, having decided before that we had gone far enough, I decided to turn. There were no cars in sight at the time I headed in, but about the time I stopped this car was approaching from the west coming around the curve. It was a half a mile or better away. I made my stop, backed out on the highway, crossed over towards the opposite side and headed towards Galena; I made my low and second shift and had started to make my last shift and had gone possibly thirty feet when I was struck. I was struck from the rear on the right rear spare and bumper. ~~Renzmeier~~ Franzmeier's car struck me."

Appellee's son and appellant were the only eye-witnesses to the collision. The other witnesses who testified confined their testimony to the location of the cars, etc., after the collision.

While the evidence is conflicting, we are unable to say that the verdict is against the manifest weight of the evidence. We would therefore not be warranted in reversing the judgment for that reason.

It is next insisted that the court erred in giving the four instructions given on behalf of appellee, the contention being that they were not based on the evidence.

This objection is well taken as to the first and second instructions. Neither of these instructions, however, directs a verdict, and we do not think that appellant was prejudiced by the giving of the same.

The third instruction is as follows:

"The Court instructs the jury that it is the law of this state that motor vehicles entering upon or crossing Routes 1 to 46 inclusive, shall come to a full stop as near the right of way as possible before driving upon the paved portion and regardless of direction shall give the right of way to vehicles upon said highway."

This instruction states a correct principle of law. It does not direct a verdict, and in our judgment appellant was not prejudiced by the giving of the same.

Aggrieved testified: When we came to the Broward Road

last evening, having decided before that we had gone

I decided to turn. There were no cars in sight so I

in, but about the time I stopped this car was approaching from the

west coming around the curve. It was a half a mile or so away.

I made my stop, looked out on the highway, crossed the

opposite side and looked towards Union; I saw the car and

and had started to make my last shift and had some difficulty

thing just when I was started. I was struck from the rear on the

Aggrieved's son and Aggrieved were the only ones present to the

collision. The other witnesses who testified described their

very to the location of the cars, but, under the

While the evidence is conflicting, we are unable to say

the verdict is against the defendant on the ground that

therefore not be warranted in reversing the judgment for this reason.

It is held that the court erred in giving the

instructions given on behalf of Aggrieved, the defendant being

they were not based on the evidence.

This objection is well taken as to the time and

form. Neither of these instructions, however, appears

and we do not think that Aggrieved was prejudiced by

THE COURT

The third instruction is as follows:

"The Court instructs the jury that it is the law of this State

that motor vehicles entering upon or crossing a highway

give, shall come to a full stop as near the right of way as possible

before driving upon the paved portion and right of way of highway

shall give the right of way to vehicles now and hereafter

This instruction states a correct principle of law. It

not direct a verdict, and in our judgment should not be

we are giving on the same.

It is insisted that appellee's fourth instruction is erroneous, in that it authorizes the jury in assessing damages, to allow for "the value of the use (of the car) while the owner is necessarily deprived of it, while it is undergoing repairs" when there was no evidence as to the value of such use.

The undisputed testimony in the record is to the effect that the actual damages to said automobile amounted to \$208.00, this being the cost of materials and labor in repairing the same. The error in giving said instruction was therefore harmless.

It is next insisted that said judgment should be reversed on account of counsel for appellee arguing to the jury that appellant carried liability insurance.

The record discloses that such argument was made, but also discloses that appellant himself was responsible for allowing the matter to be brought into the case. Appellee testified, without objection, that in a conversation he had with appellant, when the matter of settlement for the damages to appellee's car was being discussed, appellant said "he would like to settle it if possible. He said he would be obliged to see his insurance company."

Edwin Franzmeier testified, without objection, "they (appellee and appellant) talked of keeping it out of court, and Mr. Brown said, 'I will have to take it up with my insurance company!' On cross examination of this witness, appellant's counsel asked this question: "Q. Do you recall writing a statement of this case to Mr. E. W. Heise, supervisor of property damage claims of the insurance company having Mr. Brown's insurance, about September 13, 1928?"

Appellant, on his direct examination, testified that he told appellee "we would see about the payment. I said we will get our cars off of the highway and we will settle this later. I said I am protected by insurance, and whatever they say goes."

Appellant is not now in a position to urge with effect the objection as to the remarks of counsel.

It is insisted that appellant's testimony is not reliable in that it contradicts the fact in connection with the fact that the value of the car (at the time of the accident) was approximately \$1,000, while it is undisputed that the car was no longer of that value at the time of the accident.

The undisputed testimony in the record is that the car was damaged to the extent that it was no longer of that value at the time of the accident. The fact that the car was damaged to the extent that it was no longer of that value at the time of the accident is undisputed.

It is also insisted that appellant's testimony is not reliable in that it contradicts the fact that the car was damaged to the extent that it was no longer of that value at the time of the accident.

The second question that each court must decide is whether the evidence is sufficient to establish that the car was damaged to the extent that it was no longer of that value at the time of the accident. The evidence is sufficient to establish that the car was damaged to the extent that it was no longer of that value at the time of the accident.

It is also insisted that appellant's testimony is not reliable in that it contradicts the fact that the car was damaged to the extent that it was no longer of that value at the time of the accident.

and appellant's testimony is not reliable in that it contradicts the fact that the car was damaged to the extent that it was no longer of that value at the time of the accident. I will have to take it up with the jury. On the examination of this witness, appellant's testimony is not reliable in that it contradicts the fact that the car was damaged to the extent that it was no longer of that value at the time of the accident.

Appellant, on his direct examination, testified that he saw the car off of the highway and he will testify that he saw the car off of the highway and he will testify that he saw the car off of the highway. Appellant, on his direct examination, testified that he saw the car off of the highway and he will testify that he saw the car off of the highway.

It is also insisted that the court erred in refusing to direct a verdict in favor of appellant on the motions made at the close of appellee's evidence and again at the close of all the evidence.

The court did not err in denying said motions, as the evidence of appellee, taken as true, with all reasonable inferences to be drawn therefrom, fairly tended to prove his cause of action.

While other errors were assigned on the record, they were not referred to in the brief and argument, and are therefore taken as waived.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

It is also insisted that the court erred in refusing to direct a verdict in favor of appellants on the motion made at the close of appellees' evidence and again at the close of all the evidence. The court did not err in refusing said motion, as the evidence of appellants, taken as true, with all reasonable inferences to be drawn therefrom, fairly tended to prove the cause of action. While other errors were pointed out on the record, they can be not referred to in the brief and argument, and are therefore waived. For the reasons above set forth, the judgment of the trial court will be affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 I.A. 619

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 5- 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court
of Illinois

Second District

May Term, A. D. 1929.

First Trust and Savings Bank
of Sterling, Illinois, a
corporation,

Defendant in error

Error to the City Court of
Sterling, Illinois.

vs.

Edward N. Peterson, et al
(Edward N. Peterson, Elizabeth
E. Peterson, Marguerite C.
Peterson and D. G. Kingery
Plaintiffs in error)

Opinion by Boggs, J.

On November 19th, 1927, defendant in error filed a bill in the city court of Sterling, to foreclose a mortgage on certain residence property in the City of Sterling. The bill alleged that said mortgage was given by plaintiff in error, E. N. Peterson to C. E. Sheldon on October 22, 1923, to secure the payment of notes aggregating the principal sum of \$6,180; that said notes and mortgage were thereafter duly assigned to defendant in error bank; that said principal sum was due and unpaid, together with interest thereon from October 22, 1926, Said bill further alleged that on March 1st, 1924, after the execution of said mortgage, plaintiff in error had conveyed the mortgaged premises to his wife, Elizabeth C. Peterson, who thereafter on July 29th, 1927, with her husband the said E. N. Peterson, conveyed the same to their daughter, Marguerite E. Peterson; that certain mortgages or trust deeds had been placed on said premises by plaintiffs in error, and certain judgments had been taken against the said E. N. Peterson, all of which judgments and mortgages were alleged to be subsequent and inferior to defendant in error's lien.

Plaintiffs in error filed a joint and several answer to said bill, admitting the execution of said notes and mortgage to Sheldon,

but denying that anything remained unpaid thereon; charging that on October 22, 1923, the date of said notes and mortgage, a contract was executed between U. E. Sheldon and the mortgagor; that said contract among other things, provided that the mortgagor should give to Sheldon "as collateral for said loan a note of \$8,000 secured by a second mortgage" on certain described farm lands in Lee County, "and will endorse said \$8,000 so as to create a personal liability as endorser; * * * that said collateral shall be held by said first party as security for the payment of said \$6,000 loan in event that second party defaults in the payment of interest as it becomes due or the principal when it matures, first party may sell said \$8,000 note and mortgage without notice on the best terms obtainable by him at either private sale or public sale and apply the proceeds on said \$6,000 loan. Said second party agrees to deliver with said \$8,000 loan a proper assignment of the mortgage to first party so as to invest him with the power to dispose of same in the event of default as aforesaid."

Said answer further charges that Peterson, on January 12, 1924, endorsed and delivered to Sheldon said notes for \$8,000, and assigned said second mortgage to him; that, on the same date, Sheldon endorsed and delivered said notes to defendant in error, together with the mortgage securing the same; that said assignment was made without authority of law and in violation of his contract; that at the time of said assignment Peterson was not in default of said principal or interest on said \$6,000 loan; that said bank thereafter filed a bill in the Circuit Court of Lee County to foreclose said \$8,000 second mortgage; that thereafter said suit was settled by the owner of said lands executing and delivering to defendant in error bank a deed in full satisfaction of said mortgage.

Thereafter, on November 26th, 1927, the Petersons filed a cross bill, reciting the facts above set forth, and praying that "an account may be taken of the amount due your orator on said

promissory notes; and that the defendant bank may be required to pay what sum shall appear due them or any of them between said \$6,000 and \$8,000 notes and all interest collected by said defendant bank on any of said notes may be applied to said \$8,000 note, and that it may be required to pay all rents collected on said Lee County lands," etc.

To said cross bill, defendant in error filed an answer, which was later amended, admitting the execution of said contract, alleging that it secured title to said \$8,000 notes by garnishment proceedings; admitting that it had accepted a deed to said lands in full satisfaction and discharge of said \$8,000 notes; alleging that the assignments and transfers by Peterson were made to defraud his creditors, that plaintiffs in error do not come into court with clean hands, and are not entitled to relief.

On hearing, a decree was rendered, dismissing said cross bill for want of equity, and foreclosing said mortgage. An appeal was prayed but not perfected. The record discloses that the premises were sold by the master in chancery pursuant to said decree; that defendant in error purchased said premises for the full amount of the debt, interest and costs, and that said decree and costs have been fully satisfied. This writ of error is prosecuted to reverse said decree.

The record discloses that E. N. Peterson, on October 22, 1923, procured from Sheldon a loan of \$6,000 for which he agreed to pay a commission of 3%, or \$180. Three notes were executed for \$2,000 each, due three years after date, and three notes for \$60 each, due in one, two and three years after date, respectively, all bearing interest at the rate of 7% per annum. Said notes were secured by a mortgage to Sheldon on the residence property here involved. On the same date, Peterson entered into a written contract with Sheldon, which provided that Peterson was to obtain a second mortgage for \$8,000 on a farm of 231.57 acres in Lee County, owned by one Ignatius G. Schmit. Said contract stated

that said farm was represented to be worth \$52,000, subject to a first mortgage of \$20,000, and that said \$8,000 second mortgage would be subsequent only to said \$20,000 mortgage; that the notes and said second mortgage were to be assigned to Sheldon as collateral, for said \$6,180 loan. Said contract also provided for sale in case of default, etc., as above set forth.

Peterson procured said second mortgage and, on January 12, 1924, assigned the same to Sheldon and indorsed the notes secured thereby. On March 29, 1924, Sheldon sold said loan of \$6,180 to the First National Bank of Sterling, and delivered to it said collateral. The evidence is that the First National Bank and defendant in error are affiliated and practically one institution, the officers of the one being also officers of the other, except they have different cashiers.

On March 12, 1924, one John W. Martin took judgment against E. N. Peterson for \$2,046.38. Martin's judgment was assigned to Sheldon, and by him to defendant in error. On March 29, 1924, defendant in error instituted a garnishment proceeding in the city court of Sterling against the First National Bank, claiming on said judgments. The First National Bank entered its appearance and answered that it held said second mortgage of \$8000.00, as collateral security. Judgment was rendered thereon, requiring said First National Bank to deliver said collateral notes and mortgage to defendant in error, which was done on April 5, 1924.

At the April term, 1924, of the circuit court of Lee County defendant in error filed a bill to foreclose said \$8,000 mortgage. On May 17, 1926, pending said foreclosure proceedings, the owners of said farm lands conveyed the same to defendant in error, in full satisfaction of said mortgage indebtedness.

On September 26, 1924, defendant in error purchased or took over from the First National Bank said mortgage and notes for \$6,180. under an assignment from Sheldon to it, dated and acknowledged by him. Sheldon testified that the date was erroneously

stated, and that said assignment was actually given to defendant in error on April 1, 1926, in order that defendant in error might foreclose said mortgage. The evidence is that Peterson paid the interest on said \$6,180 up to October, 1926.

On March 1, 1924, E. N. Peterson conveyed said residence property to his wife, Elizabeth C. Peterson. Thereafter, on July 29, 1927, she, with her husband, conveyed the same to their daughter, Marguerite M. Peterson, and the contract with Sheldon was assigned to her. On April 7, 1927, E. N. Peterson filed his petition to be adjudged a bankrupt. In said petition, he listed as a part of his liabilities said notes for \$6,180.

It is the contention of plaintiffs in error that, under the contract with Sheldon, the mortgage of \$8,000 was assigned solely as collateral security for said \$6,180 loan; that defendant in error should be held to have received \$8,000 on said collateral; that the same should be applied in satisfaction of said mortgage of \$6,180; and that there was no authority for applying said \$8,000 on any other indebtedness of E. N. Peterson.

Counsel for defendant in error insists that the conveyances by E. N. Peterson to his wife, and by her to her daughter, were made for the purpose of defrauding the creditors of E. N. Peterson, and that no relief can be granted under said cross bill.

E. N. Peterson testified that his wife had loaned him various sums of money at different times; that they settled on \$2,000 as the total amount due to her, and that he conveyed said premises to her in satisfaction thereof. He further testified that said property was worth \$8,000 at the time of this conveyance; that his daughter, Marguerite, had taught school in Rockford for several years, and had advanced to her mother approximately \$8,000 out of her earnings, and that the conveyance to the daughter was made in satisfaction of said indebtedness.

Fraud is never presumed. It must be affirmatively shown, like any other fact. *Schroeder v. Walsh*, 120 Ill. 403-409; *Brady*

v. Cole, 164 Ill. 116-121; Union National Bank vs. State National Bank, 168 Ill. 256-264; McKennan v. Mickelberry, 242 Ill. 117-134; Something more than mere suspicion is required to prove allegations of fraud. The evidence must be clear and cogent, and must leave the mind well satisfied that the allegations are true. Shinn v. Shinn, 91 Ill. 477; Shroeder v. Walsh, supra, 408; McKennan v. Mickelberry, supra, 134.

"Fraud is never presumed when transactions may be fairly reconciled with honesty, and if the weight of the evidence is in favor of an honest motive, that conclusion should be adopted." McKennan v. Mickelberry, supra, 134, citing Mey v. Gulliman, 105 Ill. 272; Bowden v. Bowden, 75 Ill. 143; Sawyer v. Nelson, 160 Ill. 629; Brady v. Cole, supra.

Counsel for defendant in error evidently takes the position that where the transactions called in question are between husband and wife, a different rule obtains, and that merely showing conveyances have been made and that thereafter the grantor becomes insolvent, is all that is necessary to stamp the transaction as fraudulent.

"Relationship is merely a circumstance that may excite suspicion, but will not of itself amount to proof of fraud, or show the absence of a bona fide debt. Hughes v. Noyes, 171 Ill. 575; American Hoist and Derrick Co. v. Hall, 208 id. 597; Merchants Natl. Bank v. Lyon, 185 id. 343; Ayers Natl. Bank v. Barber, 287 id. 182." Luthy & Co. v. Paradis, 299 Ill. 380-385.

A husband may deal with his wife or relatives in business matters, and protect them by conveyances in satisfaction of existing indebtedness, if done in good faith. Luthy & Co. v. Paradis, supra, 386.

Before the burden to disprove fraud could be cast upon plaintiffs in error, it would be necessary for defendant in error to introduce evidence that there was no valuable consideration. Luthy & Co. v. Paradis, supra, 386. The testimony offered on behalf

of plaintiff in error discloses a valid consideration for the conveyance by E. N. Peterson to his wife, and also from the wife to the daughter. No evidence was offered or admitted, in any way disputing said testimony. While the court will carefully scrutinize transactions between husband and wife, it cannot relieve defendant in error of the burden of producing evidence tending to show that the transaction was fraudulent, or that the conveyance was void. *Bowman v. Ash*, 143 Ill. 649; *Sawyer v. Moyer*, 109 Ill. 461; *Luthy & Co. v. Paradis*, supra, 386.

The evidence not only shows a valid consideration for said conveyance from Peterson to his wife, but also discloses that it was made some three years prior to Peterson being adjudged a bankrupt. There is nothing in the evidence to disclose that, at the time said conveyance was executed, Peterson was not entirely solvent. Neither is there anything to show that, after the making of said conveyance from Peterson to his wife, he did not have sufficient property remaining with which to pay all of his then obligations. In other words, defendant in error has alleged fraud, but has failed to prove it.

Another thing that might be observed in this case, in connection with the bankruptcy of Peterson, is the well known decline in values of real estate. At the time the mortgage of \$6,180 was executed, the contract between Sheldon and Peterson, made contemporaneously therewith, recited that the value of the Lee county land, on which the second mortgage of \$8,000 was given, was \$52,000, and that said mortgage of \$8,000 was subject only to a prior mortgage of \$20,000 thereon. This clearly discloses that, at said time, said mortgage of \$8,000 was worth its face, and was the property of Peterson, evidencing that, at that time, he was a man of some means. The amount of his indebtedness not being disclosed, the proof fails to support the allegation of fraud.

In *Luthy & Co. v. Paradis*, supra, the court in discussing a question of this character at page 385 says:

"There was no presumption of fraud which required the defendants to introduce proof to overcome it. The mortgage and the deeds purported to be for a valuable consideration. Before the burden to disprove fraud could be cast upon the defendants, it was necessary for the complainants to introduce evidence that there was no valid consideration."

Counsel for defendant in error also argues strenuously that the assignment of the mortgage here in question to defendant in error was not made until April 1, 1926, instead of February 15, 1924, the date which it bears and on which it purports to have been acknowledged. Whether or not this is very material, the certificate of acknowledgment is prima facie true and correct, and cannot be impeached by the mere testimony of the grantor. *Watson v. Watson*, 118 Ill. 56; *Sassenburg, v. Huseman*, 182 Ill. 341; *Gritten v. Dickerson*, 202 Ill. 372; *Kasturska, v. Bartkiewicz*, 241 Ill. 604; *Spencer v. Razer*, 251 Ill. 278; *Houlihan v. Morrissey*, 270 Ill. 66-73.

"To impeach such a certificate the evidence should ^{do} more than produce a mere preponderance against its integrity in the balancing of probabilities. It should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent. *Monroe v. Poorman*, 62 Ill. 523; *McPherson v. Sanborn*, 88 id. 150; *Marston v. Brittenham*, 76 id. 611."

In *Dickinson v. Dickinson*, 305 Ill. 521, the court, in discussing a question of this character, at page 528 says:

"There is no allegation the acknowledgment was obtained by fraud, and it has been decided where there is no allegation or proof of fraudulent collusion between the notary public taking the acknowledgment and an interested party, his certificate must prevail over the unsupported evidence of the grantor. *Oliphant v. Liversidge*, 142 Ill. 160; *Watson v. Watson*, 118 id. 56."

Said point is therefore not well taken.

Some point is also sought to be made by defendant in error to the effect that plaintiffs in error are not in a position to

question the manner in which defendant in error came into possession of said second mortgage of \$8,000, inasmuch as it is claimed B. N. Peterson was a party to the garnishment proceedings under which title is claimed, while plaintiff in error was made a nominal party to said proceedings, it was without his knowledge, acquiescence or consent. Plaintiffs in error are therefore not to be prejudiced by anything that occurred in connection with said garnishment proceeding.

A mortgage is not assignable, either at common law or under the statute. The assignment of a mortgage is only recognized in courts of equity. Any defense, good as against the mortgagee, may be interposed against an assignee. *Peacock v. Phillips*, 247 Ill. 467-473; *Pittsburg Plate Glass Co. v. Kransz*, 291 Ill. 84-91; *Hirsh v. Arnould*, 318 Ill. 22-43. It therefore follows that when defendant in error took said assignment from Sheldon, it took it subject to all equities and defenses to which it was subject in his hands. The bank having accepted a deed to said Lee county farm lands in full satisfaction of said \$8,000 collateral mortgage and interest, it was its duty to apply said proceeds, so far as necessary to the payment of said \$6,180 notes and mortgage, before making application of said funds on other amounts owing by him.

Defendant in error should be required to account to plaintiffs in error for the amount of said \$8,000 second mortgage and accrued interest thereon to the date of said conveyance to it, with interest on such total amount at the rate of 5% per annum from that date to the date of said decree. The mortgage indebtedness on said homestead property should be satisfied therefrom. As said property has been sold, if defendant in error holds the certificate of purchase, the same should be ordered surrendered up and cancelled. If held by some third party, defendant in error should be decreed to redeem said premises from said mortgage sale. Whatever balance may remain in the hands of defendant in error, the same to be applied on the judgment taken by defendant in error on said note of \$4,500,

question the woman is with a child. In some cases this is a question of fact, but in others it is a question of law.

It is a question of fact whether a woman is with a child. In some cases this is a question of fact, but in others it is a question of law.

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provided the collateral which the evidence discloses the bank held in connection therewith, proves insufficient to satisfy the debt. While the cross bill prayed for an accounting as to the rents and profits on said Lee County land covered by said \$8,000 mortgage, we are of the opinion and hold that plaintiffs in error would not be entitled thereto.

For the reasons above set forth, the decree of the trial court will be reversed and the cause will be remanded, with directions to enter a decree in substantial compliance with our holding herein.

Reversed and remanded with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 I.A. 619²

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 5 - 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1929.

The People of the State of Illinois,

Defendant in error,

vs.

Error to the County Court of
Winnebago County.

Joe Guston and Paul Scamardo,

Plaintiffs in error,

Opinion by Boggs, J.

Plaintiffs in error were convicted in the county court of Winnebago County upon an information charging them with the unlawful ~~and~~ operation of a still, and sentenced to six months imprisonment in the State Farm at Vandalia. To reverse said judgment, this writ of error is prosecuted.

Plaintiffs in error, in their brief and argument, state the proceedings involved substantially as follows:

"The plaintiffs in error were in the possession of a farm located in Rockton Township, Winnebago County. A complaint for a search warrant was made by Harry Baumgartner, a hired informer and investigator for the State's Attorney of Winnebago County, charging that intoxicating liquor was unlawfully possessed and kept for sale at said farm. Complaint was made before O. M. Williams, a justice of the peace, whose office was in the Forest City Bank Building, Rockford, Illinois. The warrant was directed to the Sheriff of Winnebago County, Illinois, and commanded the officer executing the same to bring before said justice forthwith at his office in said Forest City Bank Building any and all persons who might be found at said premises in the possession of intoxicating liquor, together with the property found, to be dealt with according to law. The Sheriff conducted the search of said premises and found a still in operation. He found the plaintiffs in error in possession of said premises and placed them under arrest. The Sheriff dismantled the

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processing involved are as follows:

still and removed it to the rear of the Court House at Rockford, taking the plaintiffs in error with it. The Sheriff did not bring the plaintiffs in error to the office of the magistrate, but the magistrate came to the rear of the Court, * * * looked at the plaintiffs in error and then went away. There were no witnesses sworn and not even the semblance of a judicial hearing.

"Thereafter the information was filed in the County Court of Winnebago County charging the plaintiffs in error (1) with the unlawful operation of a still, (2) with the unlawful manufacture of intoxicating liquor, and (3) with the unlawful possession of the same. Plaintiffs in error thereupon before the trial of the cause was entered into made a motion to impound the evidence seized at the farm and to suppress all information received by the officers while searching the farm on the grounds that (1) the officer executing the warrant did not strictly obey its command and forthwith return them to the office of the magistrate, (2) because the magistrate did not upon return of the warrant deal with the plaintiffs in error according to law and give them a preliminary hearing. Also, (3) because the informer who signed the complaint for search warrant received information upon which to base his complaint while he was a trespasser on the premises occupied by the plaintiffs in error, having gone there for the avowed purpose of invading the premises and obtaining evidence against them.

"Upon the motion to impound, Harry Baumgartner, the informer, testified that he went on the farm occupied by the plaintiffs in error without the consent of the owner or of anyone in possession; that he smelled fumes coming from one of the buildings which he described as fermenting mash; that at the time he was being paid by the State's Attorney of Winnebago County and that he was on the premises for the purpose of detecting illegal liquor. * * * He further testified that he was not an officer of any kind for Winnebago County or the Federal Government.

until and removed it to a room at the Grand Tower. ...
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"There was further testimony introduced in said hearing showing that plaintiffs in error were not returned to the office of the magistrate and that the magistrate did not accord to the plaintiffs in error a judicial hearing upon their return. These facts were all practically conceded by the defendant in error upon the hearing.

"The trial judge overruled the motion of the plaintiffs in error and the plaintiffs in error thereupon interposed pleas of not guilty. Plaintiffs in error waived the intervention of a jury and the trial proceeded before the court. Upon the trial of the cause timely objection was made to the ~~receiving~~ reception of any evidence revealed by virtue of the search warrant, but the court denied the objections. The court found the plaintiffs in error guilty and sentenced them as aforesaid."

To the statement made by plaintiffs in error, it should be added that the search warrant charged not only that intoxicating liquor was unlawfully possessed, but that it was also "kept for sale, sold, disposed of and manufactured."

No question is raised as to the sufficiency of the information or the proof offered in support of the same; in other words, it is not contended that plaintiffs in error were not guilty as charged.

Two principal grounds are urged for a reversal of said judgment, the first being that "the failure to return the defendants to the office of the magistrate who issued the warrant, and then and there have a hearing to determine whether or not property per se unlawful had been seized under the warrant, and whether there was reasonable grounds to believe that the defendants were in possession of it, rendered the warrant and all proceedings thereunder void."

In this connection, it is not contended that the search warrant was not, in its terms, in strict compliance with sections 29 and 30 of the Illinois Prohibition Act, nor that the intoxicating liquors and the still in question were not seized under a warrant

issued in strict compliance with the provisions of said statute. The irregularity complained of is that, following the seizure of said liquor and still, the same together with plaintiffs in error, were not taken before the justice who issued said warrant for a hearing thereon as provided by said Act.

The record brought in review by this writ of error has nothing to do with the proceedings had before said justice on the return of the search warrant. If the complaint and search warrant were issued in compliance with said statute, and the still and liquors were seized by the sheriff under a proper warrant, then the trial court properly overruled the motion to impound said evidence. Any irregularities that may have occurred in the justice court following the seizure of said still and liquors would not in any way affect the validity of the judgment in this case.

On the hearing on the motion to impound said evidence, plaintiffs in error called said investigator as a witness. He testified: "I have in mind the date January 3rd. On that date, I should judge I was around forty yards from that still when I first became aware of the fumes I have sworn to. I might have been closer than that -- no further. I was right back of the building the still was in, in the ditch where the slop ran, on the premises. Beter than eighty rods at that time from the main travelled highway," etc. The evidence, therefore, on the part of plaintiffs in error as well as the State, disclosed the operation of a still and the possession of said liquors, contrary to the provisions of said statute.

Section 28 of said Act provides:

"It shall be unlawful to have or possess any liquor intended for use in violating this Act, or property designed for the illegal manufacture of liquor, and no property rights shall exist in such liquor or property."

In discussing said provision, the supreme court in *People vs. Lavendowski*, 329 Ill. 223, at page 229, says:

...in which compliance with the provisions of said statute
the irregularity complained of is that, following the return of
said liquor and still, the same together with the still and
were not taken before the justice and hence were not
being thereon as provided by said law.

The record brought in review by this writ of error has nothing
to do with the proceedings and return said justice of the peace
in the return of the writ. It is the contention and argument here
is that in compliance with said statute, and the still and liquor
were taken before the justice and hence were not
being thereon as provided by said law. In
court properly overruled the motion to remove said evidence. And
investigation that may have occurred in the justice court following
the return of said still and liquor would not in any way affect
the validity of the judgment in this case.

On the hearing in the motion to remove said evidence, plain-
tiff in error called said investigator as a witness. He testi-
fied: "I have in mind the date January 21st. On that date, I should
think I was around forty years from that still when I found liquor
except of the times I have sworn to. I might have been closer than
that -- no further. I was right back of the building the still was
in, in the ditch where the alley ran, on the sidewalk. After that
eighty rods at that time from the main travelled highway," etc.
The evidence, therefore, on the part of plaintiff in error as
well as the facts, disclosed the operation of a still and the
possession of said liquor, contrary to the provisions of said

"It shall be unlawful to have or possess any liquor intended
for use in violating this act, or knowingly furnished for the illegal
manufacture of liquor, and no knowingly who shall exist in such
In discussing said provision, the supreme court in deciding

"Neither section 29 nor section 30 of the Prohibition Act makes provision for the forfeiture or destruction of the property taken upon a search warrant. The record in the case at bar fails to show any action, proceeding or order concerning the title to or the ownership or possession of the seized property, nor does it appear that any disposition of the property was made. Hence plaintiff in error was not deprived of the property taken by authority of the search warrant. Moreover, even if, after his conviction, the property had been forfeited and destroyed he would have no ground for complaint. An owner of property has no vested or constitutional right to use or allow the use of it for purposes injurious to the public health or morals, and the State has the right, in the exercise of its police power, to provide for the seizure and destruction of property so used. Gambling instruments, in their nature incapable of use for any other purpose, and intoxicating liquors held contrary to law, are within this rule. Under the Prohibition act, intoxicating liquors, when illegally possessed, are no longer recognized as property. Section 28 of the act (Cahill's Stat. 1925, p. 1035) expressly provides that it shall be unlawful to have or possess any liquor intended for use in violating the act or any property designed for the illegal manufacture of liquor, and that no property right shall exist in any such liquor or property. Articles customarily regarded as property when lawfully acquired and used for a lawful purpose, may by statutory enactment cease to be so treated and become liable to seizure, forfeiture or destruction if they, or the uses to which they are put, are deemed pernicious or dangerous to the public ^Welfare. (Glenon v. Britton, 155 Ill. 232.)"

Without further discussing this point, it is only necessary to say that it is not well taken, and that, on this hearing, we have nothing to do with the proceedings in the justice court, following the taking of said property under said search warrant.

The second ground urged is that "the facts to which the affiant swore in order to obtain the warrant, came to his knowledge

"Neither section 23 nor section 24 of the Provisional Act makes provision for the forfeiture on destruction of the property taken upon a search warrant. The record in this case is not sufficient to show any action, proceeding or order concerning the right to or the ownership or possession of the seized property, nor does it appear that any disposition of the property was made. Hence, if the writ in error was not favored of the respondents.

Moreover, even if, when the respondents, the property had been forfeited and destroyed, it would have no standing to complain. In order to recover has no vested or constitutional right to use or allow the use of it for purposes injurious to the public health or morals, and the State has the right, in the exercise of its police power, to provide for the safety and destruction of property as used. Sampling instruments, in their nature, are not for any other purpose, and interfering with their use is contrary to law, and within their right. Under the prohibition act, respondents are liable, when illegally possessed, and no person responsible for property. Section 23 of the act (California Stat. 1933, p. 1483) expressly provides that it shall be unlawful to have or possess any liquor intended for use in violating the act or any provision thereof for the illegal manufacture of liquor, and that no person right shall exist in any such liquor or property. Statutes arely regarded as property when lawfully acquired and used for lawful purposes, say by statutory enactment seems to be so directed and become liable to seizure, forfeiture or destruction, in fact, on the basis to which they are put, and licensed manufacturers of liquors to the public health. (Graham v. Patton, 1933 Cal. 202.)

Without further discussing this point, it is only necessary to say that it is not well taken, and that, on this point, we have nothing to do with the proceedings in the justice court. Following the taking of said property under said search warrant, the second ground urged is that "the State is under the obligation to obtain the warrant, and to the respondents

while he was a trespasser on the premises where the defendant lived. He was on the premises unlawfully, for the purpose of spying on the plaintiffs in error so that he could furnish himself with facts upon which to base his affidavit. The warrant was therefore void."

Without expressing any opinion as to whether, if properly preserved, the ground here urged would have merit, it is only necessary to say that this ground was not urged before the trial court. Six specific points were urged before the trial court on the motion to impound said evidence. The point here sought to be raised was not included in any one or more of them, either directly or indirectly. It is therefore not before us for review. *Bruen v. People*, 206 Ill. 417-424; *People v. McCauley*, 256 Ill. 504-511; *Darley v. Thompson*, 299 Ill. 122-124.

As no grounds have been urged going to the merits of said cause, the judgment of the trial court will be affirmed.

Judgment affirmed.

which is not a trespass on the premises where the defendant lived.
He was on the premises unlawfully, for the purpose of staying on the
premises in order to keep his family with him upon

which he had no right. The defendant was therefore liable.
The defendant's argument is that the defendant was not

liable, because the defendant was not a trespasser on the premises.
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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 JA-619³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 5 - 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

FEBRUARY TERM, 1929

CITY OF HIGHLAND PARK,
a Municipal Corporation,
by Olaf Lindblom,
a Taxpayer,

Appellee
vs.
V. C. MUSSER,

Appellant

APPEAL FROM THE CIRCUIT COURT
OF LAKE COUNTY.

Jett, J.

This suit was brought by Olaf Lindblom, a taxpayer of the city of Highland Park, Illinois, appellee, to recover back for the said city a sum of money paid to V. C. Musser, appellant, for services in spreading certain special assessments. Trial by Jury was waived and a trial by the court resulted in a judgment in favor of appellee and against the appellant for \$4107.61, and costs of suit. From said judgment, appellant prosecutes this appeal.

A number of reasons are assigned and argued for a reversal of the judgment but in view of the conclusion we have reached, there is no occasion for discussing more than one reason to-wit:- whether or not appellant Musser was eligible to hold the position of a spreader of special assessments.

Musser was Chief Clerk of the city of Highland Park, a city organized and operating under the Commission Form of Government, continuously since 1917, and up to the time of the institution of this proceeding in February 1926; appellant was appointed Chief Clerk by the city council of the city of Highland Park, on May 9, 1924, and worked in the department of accounts and finance part of the time, and in the department of public affairs the rest of the time; his salary as Chief Clerk of said city of Highland Park, was fixed by ordinance at \$2520 per annum.

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

CITY OF WASHINGTON
a municipal corporation,
by and through
its attorney,

Appellee

V. C. HENDERSON,
Appellant

Appellant

1. 100-10000

This suit was brought by Chief Henderson, a taxpayer of the City of Washington, D.C., against the City of Washington, D.C., appellee, to recover back for the said city a sum of money paid to V. C. Henderson, appellee, for services in securing certain special assessments. The City of Washington, D.C., by its attorney, the undersigned, has moved to dismiss the complaint in favor of appellee and against the appellant for \$107.00, and costs of suit. From said judgment, appellant prosecutes this appeal.

A number of reasons are assigned and urged for a reversal of the judgment but in view of the conclusion we have reached, there is no occasion for discussing more than one reason to-wit:-- whether or not appellant was eligible to hold the position of a taxpayer of special assessments.

Henderson was Chief Clerk of the City of Washington, D.C., a city organized and operating under the Commission form of Government, continuously since 1917, and up to the time of the institution of this proceeding in February 1933; appellant was appointed Chief Clerk of the City Council of the City of Washington, D.C., on May 9, 1934, and worked in the Department of Public Affairs and Finance part of the time, and in the Department of Public Affairs the rest of the time; his salary as Chief Clerk of the City of Washington, D.C., was \$8500 per annum.

It is conceded that Musser was appointed to spread the special assessments involved in this proceeding and in pursuance of said appointment, he spread the assessments and did all other work incident thereto and the city council allowed his bill for his services, which was paid to him, under and by virtue of, the vouchers introduced herein in evidence. There is little, if any, dispute as to the facts in this cause and that the main question is, whether or not the appellant may hold the position of spreader of special assessments concurrently with the position of Chief Clerk of the city of Highland Park.

Section 9, Par 83 of Article 6, of Chapter 24 of the Revised Statute Provides:- No Mayor, Alderman, City Clerk, or Treasurer shall hold any other office under the city government during his term of office. In City of Lawrenceville vs Hennessey 244 Ill 464, the court, in discussing the question as to the making of an assessment, at pages 466 and 467, said:-"The person so appointed is not technically an officer, but is an agent or employee for a single and specific purpose, whose functions are at an end upon the completion of his work. An office is a public position which does not end with the performance of a particular duty; (People vs Loeffler, 175 Ill. 585); but the legislature evidently regarded the person appointed to make an assessment as an officer, since he is called an "officer" in defining his duties in Sec. 39 of the "Local Improvement Act." In other words, it is held that the position of the person appointed to spread special assessments is not a contract or job in contemplation of law, but an office. Section 295 of Chapter 24 Smith-Hurd Revised Statute fixed the salary of Commissioner's under the Commission Form of Government.

Section 296 of said Chapter among other things provides: "All other officers, assistants or employees of such city shall receive such salary or compensation as the council thereof shall by ordinance provide."

Musser held the office of Chief Clerk, and it is claimed by appellee that he cannot have any greater power or authority than

his superior is given. If the City Clerk could not hold the office of special assessment spreader, neither could his Chief Clerk hold it. Appellant insists that the general rule, that no person can hold more than one office at a time arises only in cases where the offices are incompatible and he argues that the office of Chief Clerk in the City Clerk's office and spreader of special assessments are not incompatible positions. This argument would have much force were it not for the fact that the statute expressly prohibits the City Clerk and inferentially his deputies, from holding any other office under the City Government. Under the statute, it makes no difference whether the offices are incompatible or compatible. The officers named in the section above alluded to are prohibited from holding any other city office without regard to their incompatibility.

We conclude therefore, that the appellant as Chief Clerk in the City Clerk's office of the city of Highland Park, could not legally hold the office of a spreader of special assessments. We are therefore of the opinion, that the trial court was correct in its holding that the judgment of the Circuit Court of Lake County should be affirmed.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

55 A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 T. A. 619⁴

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 5 - 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

February Term, 1929

HARVEY B. RAMSEY, :
APPELLANT :
V S. : APPEAL FROM THE CIRCUIT
: COURT OF KNOX COUNTY.
R. M. MORGAN, :
APPELLEE. :

JETT, J.

This is an appeal by Harvey B. Ramsey, appellant, from a decree rendered by the Circuit Court of Knox County, on a bill filed by R. M. Morgan, appellee, for the correction of the description of certain premises, mentioned and described in the mortgage, and to foreclose said mortgage.

The record discloses that in April, 1926, George Heisler, bought a Nash car from R. M. Morgan, appellee, and to secure the purchase price thereof, agreed to give a mortgage on certain real estate owned by him, and located at #1506 South Henderson Street, in Galesburg, Illinois, and being the only real estate he owned. At the time of the purchase of the automobile in question the said George Heisler and Lucy Heisler, his wife, had become estranged and were not living together. They went to the office however, of L. H. Smith, a Notary Public in Galesburg, and executed a note for \$1335.00 payable to the order of R. M. Morgan, due nine months after date, with interest at seven per cent, and executed a mortgage on the real estate at #1506 South Henderson Street, in the City of Galesburg, to secure the same. Thereafter Heisler executed a chattel mortgage on the automobile to further secure the same. It appears that an error was made in the chattel mortgage and Heisler later executed a second chattel mortgage.

The evidence shows that the real estate mortgage was filed and entered of record. In June 1927, a meeting was had between George Heisler and Lucy Heisler, his wife and their respective attorneys, with a view of adjusting their property rights.

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George Heisler agreed to let Mrs. Heisler have said ^{real} estate if she would pay the judgments and claims against the property, including the mortgage, and give him \$500.00. Following said agreement the premises were conveyed to Harvey B. Ramsey, appellant.

The record further shows that Heisler and his wife were divorced and shortly thereafter Lucy Heisler was married to Ramsey, appellant. The note secured by said real estate mortgage was not paid, and it was discovered that there was an error in the description, it being stated that the property was situated in the Northwest Quarter of Section Twenty-one when it should have stated in the Northeast Quarter of said Section Twenty-one. A bill was filed by appellee in the circuit court of Knox County to have said description corrected and for a foreclosure of said mortgage, it being charged in the bill that it was the intention of Heisler and his wife to convey the premises mentioned in the Northeast Quarter of said Section, and that appellant Ramsey had notice thereof at the time he received said conveyance. To the bill, appellant filed an answer, and denied that he had any notice that it was the intention of the Heisler's to mortgage said premises that had been conveyed to him, and denied that there had been a misdescription, and that appellee was entitled to have said description corrected and the mortgage foreclosed.

On a hearing of the cause the chancellor found that the appellant had notice that said premises were intended to be mortgaged, and that he accepted a deed to the premises with knowledge that appellee claimed a mortgagee lien thereon, and corrected said description and entered a decree of foreclosure of said mortgage. To reverse said decree appellant prosecuted this appeal.

The principal questions to be determined are, (1) Whether or not it was the intention of Lucy Heisler to join with her husband in the real estate mortgage on their property?
(2) As to whether or not appellant had notice when said premises were conveyed to him that it was the intention of

George Haisler agreed to let him, Haisler was satisfied that
 he would pay the mortgage and stated that he would
 including the mortgage, and give him \$100.00. Following
 appellant.

The second further shows that Haisler was in this same
 divorced and shortly thereafter Mary Haisler was married
 to Ramsey, appellant. The wife secured a valid and correct
 mortgage was not paid, and it was discontinued and it was an
 error in the description, it being stated that the property was

When it should have stated in the description that it was
 Section Twenty-one. A bill was filed in the court in the
 circuit court of Cook County to have said description corrected
 and for a foreclosure of said mortgage, it being alleged in
 the bill that it was the intention of Haisler and his wife
 to convey the premises mentioned in the bill to Ramsey and
 said Haisler, and that appellant Ramsey had notice thereof at
 the time he received said mortgage. In the bill, appellant
 filed an answer, and denied that he had any notice of the
 the intention of the Haislers to mortgage said premises and
 had been conveyed to him, and denied that Haisler and his wife
 had any notice of the mortgage at the time it was
 description corrected and the mortgage foreclosed.

On a hearing of the cause the circuit court found
 the appellant had notice that said premises were intended to be
 mortgaged, and that he accepted a deed to the premises with
 knowledge that appellee claimed a mortgage on the premises,
 and corrected said description and entered a decree of fore-
 closure of said mortgage. He however said to the appellant

The principal question to be determined was, did Haisler
 or not it was the intention of Haisler and his wife to convey
 husband in the real estate mortgage on their property.
 (2) As to whether or not appellant had notice of the
 premises were conveyed to him that it was the intention of

said parties to have mortgaged the same, and that there was an error in the description?

(3). As to whether or not the court erred in permitting Heisler and other witnesses to testify as to conversations had between Heisler and his wife, prior to their being divorced?

There can be no question from the evidence, but what Lucy Heisler knew all about the real estate mortgage which she and her husband gave to Morgan, appellee. She went with her husband to the office of L. H. Smith, a Notary Public and her husband stated in her presence, that they wanted to execute a real estate mortgage, and he produced a deed from which the scrivner prepared the note and mortgage. She knew that this mortgage indebtedness was a part of the indebtedness which she was to pay in order to have George Heisler relinquish his rights in the real estate, for the \$500.00.

After an investigation of the evidence, we are of the opinion that it fully sustains the finding of the Chancellor, to the effect that Lucy Heisler, the wife of George Heisler, intended to join with her husband in mortgaging the real estate at #1506 South Henderson Street, in Galesburg.

It is insisted by the appellant that he did not have knowledge of the mortgage on the real estate in question, held by him. It appears that Ramsey was a very intimate friend of Mrs. Heisler's and apparently took a very great interest in her affairs. He had been waiting on her for some time prior to her obtaining a divorce, and the evidence shows that he put no money into the property, other than what he derived from a building and loan mortgage he placed on the property after it had been deeded to him. Ramsey talked to Carl Morgan, a son of appellee, and asked him about the amount of the Morgan mortgage on the Heisler property at \$1506 South Henderson Street. Ramsey talked with ReRoy J. Darnell about the Heisler place and about the Heislars. He said that the Heisler place was heavily mortgaged and spoke of the mortgage on the place that Heisler gave Morgan when he bought the car.

self parties to have recognized the same, and that there was

an error in the description.

(7) As to whether or not the party named in connection

with the other witnesses as being the same person

and between father and his wife, under the stated circumstances

there can be no question that the evidence, for the

fact of father's death, is about the same as in the case of

the other parties named in the evidence, and that

with her husband to the extent of \$10,000, a party named

and her husband stated in her evidence, that they were

executors of a will made by father, and to the fact that

which the mother named in the evidence, the same

which was to pay in order to have father's estate

which was in the case of father, the same

which was in the case of father, the same

the father had in father's estate, the same

thereafter, to the effect that father's estate, the same

George W. father, intended to pay in order to have

the real estate of 1500 South Washington Street, in

it is included in the evidence that he did not have

held by him. It appears that father was a party to father's estate

of the father's estate, and father's estate, the same

her estate. He had been residing on her estate, the same

her estate, and the evidence given that he had

no money in the estate, other than what he carried there

bringing and then mortgage he placed on the property, after he

had been forced to him. He was willing to pay for the same

applied, and asked him about the amount of the same, and

on the father's property of 1500 South Washington Street.

and about the father's estate. It seems that the father's estate was

heavily mortgaged and applied on the same, and the same was

father gave money when he bought the same.

After the foreclosure suit was instituted, Ramsey again talked with Darnell, and said he was not worried about the suit, that he figured on giving Morgan a "good reaming." Ramsey talked to Clarence Darnell about the Heisler affairs and said that Heisler had given Morgan a mortgage on the place when he bought the Nash car.

There are other facts and circumstances disclosed by the record that show the appellant had knowledge that the Heisler's had given a mortgage on the real estate in question to secure the note, given for the car. In view of the state of the record, we are of the opinion that the evidence supports the finding that appellant Ramsey knew, at the time said conveyance was made to him, that Heisler and his wife had executed a mortgage, intending to cover the premises at 1506 South Henderson Street in Galesburg.

Relative to the contention of appellant that the court erred in permitting Heisler and others to testify with reference to conversations between him and his wife prior to said divorce proceedings, we are of the opinion that aside from this testimony, the evidence is sufficient to sustain the decree. This was a chancery proceeding, and the competent evidence found in the record is sufficient to sustain the contention of appellee, notwithstanding incompetent evidence may have been heard.

In passing it might be well to observe that appellant is not in a position to consistently raise this question, for the reason that he placed Mrs. Heisler on the witness stand, and she testified generally, with reference to the entire transaction. It does not lie in the mouth of the appellant to call a witness to testify in his behalf, and then insist that she was incompetent.

We conclude therefore, that the decree of the Circuit Court of Knox County should be affirmed, which is accordingly done.

Decree affirmed.

When the foreman said that the witness was not

able to remember the name of the witness who

was with him at the time of the shooting, the

witness said that he did not know the name of

the witness who was with him at the time of the

shooting.

There are other facts and circumstances which

show that the witness was not with him at the

time of the shooting, and that the witness was

not with him at the time of the shooting.

One of the witnesses who was with him at the

time of the shooting, and who was with him at the

time of the shooting, and who was with him at the

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time of the shooting, and who was with him at the

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 LA. 319⁴

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 5 - 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

February Term, 1929.

Bruce Johnson,

appellee

vs.

Appeal from the County Court of

Shidler Construction Material

Kankakee County.

Company, a corporation,

appellant,

Jett, J.

This is an appeal from a judgment for \$650, obtained by Bruce Johnson, appellee, in the County Court of Kankakee County, against Shidler Construction Material Company, a corporation, appellant, for a breach of alleged contract of employment for self and truck during the season of 1927.

The declaration consists of 5 counts, 3 special counts in the original declaration, the common counts, and an additional count.

In the first count it is charged, that on the 15th day of February, 1927, appellant employed appellee with his truck for the season of 1927, for not less than 120 days at \$20 per day and that appellee entered upon the performance of said contract, but that appellant refused to give him 120 days employment at \$20 per day. In the second, it is averred, that on the 15th day of February, 1927, appellant proposed to appellee, that if he would purchase an International truck, appellant would employ him with his truck and would guarantee him work during the season of 1927, from 120 to 135 days at \$20 per day, and that he, appellee, accepted said employment but that appellant refused to pay him the full amount of said contract, but only paid him \$1400. In the 3rd count, it is averred, that it was agreed between appellant and appellee, that if appellee would purchase an International truck, appellant would employ him with his truck at an average wage of

Applicant

NY

Company, a corporation,

State, N.Y.

This is to certify that the above named person, who is a resident of the State of New York, is a member of the State Bar of New York, and is a member of the New York State Bar Association.

Applicant, who is a resident of the State of New York, is a member of the State Bar of New York, and is a member of the New York State Bar Association.

The above named person, who is a resident of the State of New York, is a member of the State Bar of New York, and is a member of the New York State Bar Association.

Applicant, who is a resident of the State of New York, is a member of the State Bar of New York, and is a member of the New York State Bar Association.

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Applicant, who is a resident of the State of New York, is a member of the State Bar of New York, and is a member of the New York State Bar Association.

\$20 per day for the season of 1927, running from 120 to 135 days; that he purchased said truck and entered employment, but appellant refused to pay him for the 120 days and only paid him \$1400. The 4th count consists of the common counts. In the additional count, appellee avers, that it was agreed between appellant and appellee, that if appellee would purchase an International truck, appellant would employ him at an average of \$20 per day during the season of 1927, for a period of 120 to 135 days; that he purchased an International truck for \$2029.75, and entered on said employment. Said count charges the payments appellee was to make on said truck and avers that he was only furnished with employment amounting to \$1400. To said declaration, appellant filed a plea of the general issue.

A trial was had with a jury, resulting in a verdict and judgment in favor of appellee for \$650. Appellant prosecutes this appeal.

Appellant seeks reversal of the judgment on the ground, first, that the evidence fails to show a contract was entered into as charged by appellee in his declaration. Second, that it is not shown that the witness Loiselle, with whom appellee charges a contract was made, had authority to make or bind his principal to a contract as is involved herein.

In view of the conclusion we have reached, it will only be necessary to consider the first reason relied upon by the appellant for a reversal of the judgment.

The record shows that appellee, in his own behalf, testified that about February 15, 1927, he had a conversation with one Percy Loiselle, the person who had the employing of the men and the hiring of trucks for appellant in which Loiselle said to him: "He says to me, 'Are you going to buy a truck? We got to have bigger trucks. We are buying a new mixer, a big seven-batch mixer, a bigger mixer to handle our batches. If you buy one of these trucks, he says, 'you can make -- we will give you at least twenty dollars a day, an average of twenty dollars a day.'

"Well, 'I says, 'I am not sure. I don't expect twenty dollars a day. Probably run one day, eighteen dollars; next day might run twenty-two or twenty-three, 'he says. Then he says, 'You are acquainted with the hard-road work enough to know you are going to make your wages, and 'he says, 'we will give you an average of twenty dollars a day.' At that time an International truck cost \$2,029.75. He says, 'You know if we have good weather it runs 130 to 135 days.' Last year, I think he said, 123 days he run last year; runs from about 120 to 135 days, what a season amounts to.

"If you buy an International truck I will give you an average of twenty dollars a day for a period of 120 to 135 days, according to the weather.

"I told him I would think it over; would talk to wife. Didn't see him again until after I had truck bought, and then told him I got it and 'I am ready to go to work.' He says, 'Fine,' and Mr. Shidler says, 'You got a good truck, keep it well greased.' I paid \$2,029.75; paid \$481.75 cash; balance of payments were to be made \$172.00 a month for six months and \$86.00 a month for following six months, except during period of six months through winter we didn't have to pay.

"The Shidler Construction Material Company paid me about ~~\$1400~~ \$1400.00 for season of 1927."

On redirect examination appellee testified: "I rendered all the services during that season that they called on me for, and did at no time refuse to render any services unless my truck happened to be broke." On recross examination appellee, testified: "'I worked for other contractors during the year. I don't remember what period of time. I don't recall who I worked for, and don't recall the month. I don't remember whether I worked for more than one contractor or not. My truck was broken down may be six or seven working days, not much over that, during the season.

"Well, I say, 'I am not sure, I don't expect twenty

dollars a day. Probably not one day, fifteen dollars, but

might not twenty-two or twenty-three, the way it goes,

'You are acquainted with the bank, and the way it goes, and

going to make your money, and the way it goes, and the way

average of twenty dollars a day, the way it goes, and the way

twenty-two or twenty-three, the way it goes, and the way

is not last year; was from about 180 to 185, the way it goes,

amount to.

"If you say an international bank, I will show you an

average of twenty dollars a day for a period of ten to 185, the way it goes,

amount to the way it goes.

"If you say an international bank, I will show you an

average of twenty dollars a day for a period of ten to 185, the way it goes,

amount to the way it goes, and the way it goes, and the way it goes,

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"The million banks, other national banks, the way it goes,

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amount to the way it goes, and the way it goes, and the way it goes,

There are times when weather conditions interfere with this class of work. I did not work for any other people when Shidler demanded or required my time."

On behalf of appellant, Loiselte testified that he had a conversation with appellee about February 15 or March 1, 1927, and that appellee stated: "He had heard we were going to get a larger mixer, wanted to know what kind of trucks we were going to use. I told him we would have to use larger trucks than those that had been used in the past. He wanted to know just about what size trucks, and I told him anything that would carry a ton and a half would be all right, so he went away and said he would see what he could find out. He didn't say whether he was going to work; that it all he said, he was going to try and find out. All I said about the seasons, that they varied all the way from 80 to 88 up to 120 or 130 days, some seasons running quite a bit less than other seasons. * * * Told him we would not have work at that time. Did not then know how many days work the company would have. * * * I did not tell Johnson that the company would guarantee him any certain number of days work at so much a day. * * * The truckwork is paid so much per load." On re-examination, Loiselte testified: "Johnson did labor work and truck hauling. The hauling, other than batches, was a straight hour rate. On the batches he was paid according to the distance of the hauling. During the period Johnson was employed, he never made any protest as to the payments or the amount he was earning. * * * Mr. Johnson was paid more than \$20 a day on a great many days, then on some days he was paid less than \$20 per day."

In rebuttal, Percy Murray testified on behalf of the appellee: "I am a truck salesman for the International Harvester Co. and have been so employed for eight years. I saw Mr. Loiselte at the office of the Shidler Construction and Material Co. * * * Loiselte said in substance that they would work by trips, and their rates would be figured according to the road conditions,

and that they would make ~~an~~ an average of \$20 per day; that the working season would run anywhere from 100 to 120 days."

Hilary Mills testified in rebuttal for appellee: "Percy Loïselle said to me in the month of May or early part of April, 'if you will buy an International truck and work with us, we will guarantee you work for the season of 120 to 125 days, at \$20 per day." On cross examination, he stated, "I have a suit pending, similar to this suit, against the Shidler Construction Material Co."

Leo Vincent testified in rebuttal for appellee: "Loïselle made a statement to me that if I would buy a truck, he would guarantte an average of \$20 a day from 125 to 135 days."

Appellee, called for further cross examination, testified: "As near as I can tell, Mr. Loïselle's statement that I worked 175 days during 1927 season is as near as I can figure." On re-examination he testified: "65 days were driving truck, and 110 days I was working by the day at 40¢ an hour."

The foregoing is substantially the ~~the~~ testimony in this cause. The question now is, when the testimony is considered, does it show that a contract was entered into by appellee and appellant? We can not agree with the contention of appellee, as stated by him, that the only question before the court, is, did Percy Loïselle have the authority of the appellant to enter into the contract in question, testified ~~to~~ by the appellee?

We have examined the evidence carefully and we are of the opinion that it fails to disclose that appellee and appellant entered into a contract as claimed by appellee. The record discloses that Loïselle specifically denied having agreed for appellant company to pay appellee for any certain time or any certain amount per day. And the testimony of appellee fails to disclose that even if appellant purposed to pay him a certain amount per day for a certain number of days, that he accepted said

and that they would make an average of \$20 per day and the
working company would pay them from 100 to 150 dollars.
Lillian also testified in reference to the applicant's
statement to her in the month of May or early part of June,
1935 that she had an international bank and would like to
guarantee you for the summer of 1935 to 1936 from 100 to 150 per
day. On cross examination, he stated, "I have a bank building
similar to this one, against the building furnished in testimony
of".
Lillian also testified in reference to the applicant's statement
made a statement to her that if I would pay a woman, he would
guarantee an average of \$20 a day from 100 to 150 dollars.
"As near as I can tell, the applicant's statement that I worked
1935 days during 1935 season is as near as I can tell."
re-examination he testified: "55 days were during travel, and 193
days I was working by the day at 40¢ an hour."
The foregoing is substantially the testimony in this
cause. The question now is, when the testimony
does it show that a contract was entered into by applicant and
applicant? We can not agree with the contention of applicant, as
stated by him, that the only question before the court, in this
Ferry, is whether the applicant has the authority to make such
the contract in question, testified to by the applicant.
We have examined the evidence carefully and we are of the
opinion that it tends to show that the applicant and applicant
entered into a contract as claimed by applicant. The evidence, how-
ever, that the applicant specifically denied making such a contract
applicant company to pay applicant for any certain time or for
certain amount per day. And the testimony of applicant tends to
show that even if applicant refused to pay him a certain
amount per day for a certain number of days, that he received no

proposition and bound himself to abide thereby, his testimony being, that he stated that he would talk it over with his wife; that some time thereafter he purchased a truck and reported to Loiselle that he had a truck and was ready to go to work and that Shidler said "Fine." In other words, it appears that appellee did not state to Loiselle that he would purchase a truck and enter the employment for 1927, on the terms stated. What he said was, that he would see his wife, and that he thereafter purchased a truck and began work.

10-2-27
The evidence also shows, that ^{appellee} ~~the appellant~~ worked for others during the season of 1927; that he worked for ^{appellee} ~~appellee~~ without his truck at 40¢ per hour for 110 days; that he was paid, not at \$20 a day but depending on whatever his work would come to, taking into consideration the work he did on a particular day, and he acquiesced in the amount of the work furnished him and in the pay received. If the contract entered into was, as is claimed by appellee, why did he work for appellant 175 days in all, 65 days truck work, 110 days by the day at 40¢ an hour and for other contractors during the year 1927, without making complaint.

Some testimony was offered in rebuttal. The testimony offered in rebuttal as to what Loiselle may have said to other persons with reference to what appellant would pay him, was not competent. It would not have been competent if offered in chief, and was certainly not competent in rebuttal.

We are of the opinion, that the evidence of appellee is wholly insufficient to establish the fact that a contract was made and the judgment of the trial court will be reversed and the cause remanded.

Reversed and Remanded.

propagation and found himself to abide thereby, his testimony being that he stated that he would talk to one with this mind that some time thereafter he purchased a truck and returned to Molokai that he had a truck and was ready to go to work and that Kuhlman said "fine". In other words, in evidence that he did not state to Kuhlman that he would purchase a truck and return the employment for 1937, on the terms stated. That he would not that he would see his wife, and that he thereafter purchased a truck and began work.

The evidence also shows, that Kuhlman worked for others during the season of 1937; that he worked for Kuhlman without his truck at 40¢ per hour for 110 days; that he was paid, not at \$20 a day but depending on whether the work was done, some he taking into consideration the work he did on a particular day, and he was paid in the amount of the work he did on a particular day in the pay received. If the contract entered into was, to be signed by Kuhlman, why did he work for Kuhlman 110 days for \$40 65 days each week, 110 days by the day at 40¢ per hour and for 110 days by the day at 40¢ per hour, 110 days by the day at 40¢ per hour.

Some testimony was offered in rebuttal. The testimony offered in rebuttal as to what Kuhlman may have said to others persons with reference to what applicant would pay him, was not competent. It would not have been competent if offered in rebuttal, and was certainly not competent in rebuttal.

We are of the opinion, that the evidence of applicant is wholly insufficient to establish the fact that a contract was made and the judgment of the trial court will be reversed and the cause

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25074-020

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 5- 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

May Term, 1929.

The People of the State of
Illinois,

Defendant in error

vs.

Error to the County Court of
Winnebago County.

Albert Calacurcio,

Plaintiff in error

Jett, J.

At the November term, 1928, an information consisting of two counts was filed in the County Court of Winnebago county by the State's Attorney thereof, against Albert Calacurcio, plaintiff in error.

In the first count, the plaintiff in error was charged with the unlawful sale of intoxicating liquor. In the second, with the unlawful possession of intoxicating liquor.

The plaintiff in error pleaded, not guilty. A jury trial was had and the plaintiff in error was found guilty under the second count of the information. Motions for a new trial and in arrest of judgment were made and denied. Judgment was rendered upon the verdict of the jury, and the plaintiff in error was sentenced to the county jail in the county of Winnebago for a period of sixty days. This writ of error was sued out by the plaintiff in error for the purpose of having the record reviewed.

It is first insisted that the court erred in permitting the defendant in error to introduce in evidence, intoxicating liquor found on the premises not occupied by the plaintiff in error. The plaintiff in error conducted a grocery store at 415 15th Avenue in the city of Rockford in a two story building with basement compartments thereunder. Its dimensions are 40 X 60 feet, which are also the dimensions of the first floor and the basement compartments. On the first floor there is a front room facing

101111

To find value of $\sin \theta$ at $\theta = 0$

— 100 —

• *Th. c. 100*

There is a front room facing

the street in which is a soda fountain, counter, and other furniture and fixtures. This room embraces about one-third of the first floor space and was in the possession and use of the plaintiff in error. Back of this room is a room containing tables and chairs, and is possessed and used by the plaintiff in error in connection with his business, where patrons congregate to play games at cards, and it is entered from the front room by ascending three steps. The remaining part of the first floor is divided into a kitchen and two other rooms with doors from one room to the other, and to the room used for card playing purposes. The last three rooms mentioned were used by the father of plaintiff in error, and family for living quarters. The father owned the building. It appears that the basement of the building was divided into two compartments, one in front entirely separated from the rest by a wall, another compartment which contains a furnace and connections for heating the building. The first mentioned compartment in the basement is entered by means of a stairway from the front room and the other by means of a stairway opening up to the living quarters.

A search warrant was issued, for the search of the first floor and basement of the building in question. The search warrant was broad enough to include a search of the first floor and basement. They were searched, and as a result of the search on the first floor and basement thereunder, the officers testify that a pint bottle, partly filled with liquor was found on a shelf under the counter of the soda fountain in the front room of the plaintiff in error and on the first floor of said building. On a shelf in a coal bin, which supplied the furnace for heating the building including the room used by the plaintiff in error, was found two gallon bottles, one filled and the other partly filled with intoxicating liquor, designated as moonshine and home made whiskey.

The fourth exhibit was a pint bottle, which the testimony shows, had an alcoholic odor and contained 51% alcohol by volume.

The witness Mouritsen testified that he purchased the bottle containing the alcohol from the plaintiff in error, and he got it from him at his place of business heretofore mentioned and described and at the time he received it \$3.00 passed for it. The place in the building, in which the liquor was found, being the coal bin in the basement, and the front room of the first floor were quite closely related according to the evidence. The basement room was used in conjunction with the two front rooms on the first floor for supplying the necessary heat and there was no other means of supplying heat for the premises used by the plaintiff in error. After investigation of all the evidence, we are of the opinion that all of the exhibits were properly admitted in evidence against the plaintiff in error.

It is next insisted that the court erred in giving the third instruction given at the request of the defendant in error. The instruction is as follows:- The court instructs the jury as a matter of law that the rule which clothes every person accused of crime with the presumption of innocence and imposes upon the state the burden of establishing guilt beyond a reasonable doubt, is not intended to aid any one who is, in fact, guilty of crime to escape, but is a humane provision of the law intended so far as human agencies can, to prevent an innocent person from being convicted.

Plaintiff in error insists that it was error to give this instruction on the ground that it undertakes to define "reasonable doubt." He suggests that the term "reasonable doubt" needs no definition. As we view the instruction, it does not undertake to define or give any definition of "reasonable doubt."

The instruction herein complained of, has been frequently given and sustained by the court and is not subject to the objection made by the plaintiff in error. It is urged that the fourth instruction given on behalf of the defendant in error is erroneous and constitutes reversible error.

... without hesitation testified that he purchased the ...
containing the alcohol from the plaintiff in error, and he sold it
from him at his place of business herebefore mentioned and for ...
and at the time he received it \$3.00 per case for it. The place
the building, in which the liquor was found, being the second floor
the basement, and the front room of the third floor were entire
... ..

used in conjunction with the two front rooms on the third floor
for supplying the necessary heat and there was no other means
it was necessary for the plaintiff to use the same for ...
After investigation on all the evidence, we are of the opinion
that all of the exhibits were properly admitted in evidence and
the plaintiff in error.

It is next insisted that the court erred in giving the
third instruction given at the request of the defendant in error.
The instruction is as follows:-- The court instructs the jury on
matter of law that the rule which excludes every person accused
crime with the exception of innocence and duress ...
the burden of establishing guilt beyond a reasonable doubt ...
intended to aid any one who is, in fact, guilty of crime ...
but is a humane provision of the law intended to let an innocent
person go, to prevent an innocent person from being convicted.

Plaintiff in error insists that it was error to give this
instruction on the ground that it is intended to define "reasonable
doubt". He suggests that the term "reasonable doubt" means no
doubt. As we view the instruction, it does not seem to us
... ..

The instruction herein complained of, has been given ...
... ..
... ..
... ..
... ..

The part of the instruction objected to is as follows, "and if after considering all of the evidence in the case, the jury find that he has (meaning the defendant) wilfully and corruptly testified falsely to any fact material to the issue in the case then you have the right to entirely disregard his testimony except in so far as his testimony is corroborated by other credible evidence or by facts and circumstances in evidence in the case." The objection made to this instruction is that it singles out the testimony of the plaintiff in error. Plaintiff in error relies in his criticism of the language used in this instruction upon the case of the People vs. Schuele, 326 Ill. 366, which held that it was error to give the instruction in that particular case.

Subsequently however, the court had before it, the case of People vs. Kircher, 333 Ill 200, and in its opinion in the Kircher case at page 207 the court said, "This instruction advised the jury that defendant, having become a witness in his own behalf, became as any other witness and his credibility was to be subjected to the same tests; that the jury had a right to take into consideration the fact that he was interested in the result of the prosecution, and if, after considering all the evidence, they found the accused had wilfully and corruptly testified falsely to any fact material to the issues in the case, they had a right to entirely disregard his testimony, except in so far as it was corroborated by other credible evidence or facts and circumstances presented in evidence. It is contended that this instruction unduly singled out the testimony of the accused. In support of counsel's objection they cite People vs. Schuele, 326 Ill. 366. In that case there was a serious question as to whether witness Lick, who furnished the only evidence against the accused, had wilfully and corruptly testified falsely, and it was held that from such an instruction under the facts in that record, the jury might infer

The point of the instruction objected to is as follows:

"and in so far as the evidence in the case, the

jury find that he was (meaning the defendant) guilty and

consequently testified falsely to any facts material to the issue

in the case then you have the right to entirely disregard his

testimony except in so far as his testimony is corroborated by

other credible evidence or by facts and circumstances in evidence

in the case." The objection goes to this instruction in that it

singles out the testimony of the defendant in error. The instruction

in error relates in its criticism of the defendant's testimony to the

instruction upon the case of the People vs. Bynum, 333 Ill. 501, 502,

which held that it was error to give the instruction in that form.

error case.

Substantively however, the court has before it, the case of

People vs. Bynum, 333 Ill. 500, 501 in its opinion in the Bynum

case at page 507 the court said, "The instruction advised the

jury that defendant, having become a witness in his own behalf,

became as any other witness and his credibility was to be subjected

to the same test; that the jury had a right to take into consideration

the fact that he was interested in the result of the prosecution

and if, after considering all the evidence, they found the

accused had wilfully and corruptly testified falsely to any fact

material to the issue in the case, they had a right to entirely

disregard his testimony, except in so far as it was corroborated

by other credible evidence or by facts and circumstances in evidence

in evidence. It is contended that this instruction was highly prejudicial

and the testimony of the accused. In support of this contention it is

learned that the People vs. Bynum, 333 Ill. 500, 501. In that case

there was a serious question as to whether witness Bynum, who

furnished the only evidence against the accused, was wilfully and

corruptly testified falsely, and it was held that there was a

instruction upon the facts in that case, the jury might find

that while they were permitted to disregard the testimony of the accused if he had testified falsely, they would not have the right, under the same circumstances, to disregard the testimony of Lock, and under such circumstances it was erroneous to give the instruction. Such facts do not appear in this record. This instruction, in cases where the accused took the stand, has been frequently approved."

The record discloses that the plaintiff in error took the witness stand and testified in his own behalf in the case at bar, and it will be observed also, that the instruction complained of used the following language:- "The court instructs the jury that the defendant, having become a witness in his own behalf, at once became the same as any other witness and his credibility is to be tested by, and subjected to, the same tests as are legally applied to any other witness."

The instruction not only recites that the defendant became a witness in his own behalf and in doing so he became the same as any other witness, and that his testimony was to be subjected to the same tests as other witnesses.

In view of the state of the record, we are not prepared to say that it was reversible error to give this instruction. While we are of the opinion that this instruction is subject to criticism, we do not believe it constituted reversible error under the facts in this case. The judgment of the county court of Winnebago county will therefore be affirmed.

Affirmed.

that while they were permitted to discuss the testimony of the accused it is not established that they were not permitted to discuss the same circumstances, to discuss the testimony of each, and under such circumstances it was erroneous to give the instruction. Such tests do not appear in this record. This instruction, in other words, is correct both in form and in substance.

The record discloses that the district attorney took the witness stand and testified in his own behalf in the case at bar, and it will be observed also, that the instruction contained or used the following language: - "The court instructs the jury that the defendant, having become a witness in his own behalf, is one who becomes the same as any other witness and his credibility is to be tested by, and subjected to, the same tests as are legally applied to any other witness."

The instruction was duly received by the defendant because a witness in his own behalf and in doing so he became one and the same as any other witness, and that his testimony was to be subjected to the same tests as other witnesses.

In view of the state of the record, we are not prepared to say that it was reversible error to give this instruction. While we are of the opinion that this instruction is subject to criticism, we do not believe it constituted reversible error under the facts in this case. The judgment of the county court of Winnebago county will therefore be affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 T.A. 620²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 13 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Presley B. Price,

appellee,

vs.

The City of Geneseo,

appellant,

Appeal from the Circuit Court

of Henry County.

Jett, J.

This suit was instituted by Presley B. Price, appellee, in the circuit court of Henry county, against City of Geneseo, appellant, to recover damages for an injury he claims to have received by reason of the negligence of the appellant, as charged in the declaration. For the purpose of this opinion, appellee is referred to as plaintiff and appellant as defendant.

The declaration consists of four counts, and avers that on May 14, 1927, the plaintiff, while riding in a truck on Exchange Avenue, in said city, ran into a hole on the west side of the street, was thrown from the truck and sustained injuries to his right arm and wrist, for which he brought suit. The different counts set out the alleged negligence of the city in somewhat different language. The first count charged the defendant with negligence in permitting the hole in question to be in the street; the second count charged the defendant with negligently digging the hole in the street and permitting the grass and weeds to grow up and around it and obscure it from view; the third avers that the defendant negligently permitted the hole to remain in the street for two years with actual knowledge that it was there, or with knowledge of facts, which in the exercise of due care, constituted notice; and the fourth charged the defendant with wilfully and negligently digging the hole in the street, and wilfully and negligently permitting it to remain there; and wilfully and negligently permitted it to become concealed by weeds and grass. Each count avers that it was the duty of the defendant to keep

Appeal from the Circuit Court
of Henry County.

Appellee,

vs.

The City of Kansas,

Appellant.

July 7.

This writ was granted by the Hon. J. B. Felt, a Justice of the

the Circuit Court of Henry County, Kansas, and the writ was

to recover damages for an injury to the plaintiff's property

reason of the negligence of the defendant, as charged in the

complaint.

The complaint and defendant's answer are as follows:

The defendant consists of four persons, and owns and

owns, in 1887, and plaintiff, while riding in a wagon on

Avenue, in said city, ran into a hole on the west side of the

street, was thrown from the wagon and sustained injuries to his

right arm and wrist, for which he brought suit. The defendant

denies that the plaintiff was negligent of his city in causing

different language. The first count charged the defendant with

negligence in permitting the hole in question to be in the street;

the second count charged the defendant with negligent

the hole in the street and permitting the grass and weeds to grow

up and around it and obstruct it from view; the third count that

the defendant negligently permitted the hole to remain in the

street for two years without having the hole filled up, or

with knowledge of the fact, which in the streets of the city, con-

stituted notice; and the fourth charged the defendant with wil-

fully and negligently digging the hole in the street, and wilfully

and negligently permitting it to remain there; and fifthly and

sixthly charged that the defendant was guilty of the same and

that it was the duty of the defendant to keep

said street safe for travel. To the declaration the defendant pleaded the general issue and two other pleas which, in effect amounted to the general issue.

A trial by jury was had which resulted in a verdict in favor of the plaintiff for the sum of \$4900. A motion for a new trial was presented and argued. Before the motion for a new trial was passed on, a remittitur of \$1900 was filed by plaintiff. Motion for a new trial was denied and judgment entered on the verdict for the sum of \$3000, a remittitur of \$1900 having been entered. The defendant prosecutes this appeal.

The first contention of the defendant is that the verdict is against the manifest weight of the evidence. In view of the fact that the judgment in this cause will have to be reversed and the case remanded, we refrain from discussing the weight of the evidence.

It is urged that the court erred in admitting certain exhibits, offered on behalf of plaintiff. Exhibit one, ~~originally~~ evidently, was offered for the purpose of aiding the jury to understand the physical condition of the street, at the time and place of the accident, that resulted in the injury to the plaintiff. It appears that exhibit one was not prepared until a considerable length of time after date of the injury complained of. In order to be admitted the evidence should show that at the time the exhibit was made, the street was in the same condition as it was at the time of the accident, but the admission of this particular exhibit, at this time is not so important owing to the conclusion we have reached in this cause.

Exhibit three, complained of, was the x-ray picture of the hand and wrist of the plaintiff, taken shortly before the trial of this case. No serious error was committed in reference to said exhibit three.

It is next insisted that the court erred in the giving of the 5th, 6th, 7th, 8th, 9th, 10th, 12th, 13th, 15th, 17th and 18th

all these facts were known. To the defendant the defendant
placed the general issue and two other issues, in order

to show that the defendant was

in a position to know the facts

of the plaintiff's loss of \$1000. A motion for a new trial

was presented and argued. Before the motion for a new trial was

granted, a remittitur of \$1000 was filed by the plaintiff. Motion

for a new trial was denied and judgment entered on the verdict

the sum of \$3000, a remittitur of \$1000 having been entered. The

defendant's motion for a new trial

The first contention of the defendant is that the verdict is

against the manifest weight of the evidence. In view of the fact

that the judgment in this cause will have to be reversed and the

case remanded, as a matter of course, the defendant is entitled to

it is urged that the court erred in admitting testimony which

was offered on behalf of the plaintiff. The defendant's motion

for a new trial is based on the ground that the jury was prejudiced

by the admission of the evidence. The defendant's motion

is based on the ground that the jury was prejudiced by the

admission of the evidence. The defendant's motion is based on the

ground that the jury was prejudiced by the admission of the

evidence. The defendant's motion is based on the ground that the

jury was prejudiced by the admission of the evidence. The

defendant's motion is based on the ground that the jury was

prejudiced by the admission of the evidence. The defendant's

motion is based on the ground that the jury was prejudiced by

the admission of the evidence. The defendant's motion is based

on the ground that the jury was prejudiced by the admission of

the evidence. The defendant's motion is based on the ground that

the jury was prejudiced by the admission of the evidence. The

instructions, given at the request of plaintiff. Instruction 15, given on the part of plaintiff, is as follows:- "You are further instructed that if you believe from a preponderance of all the evidence in this case, that the defendant is a municipal corporation, and as such, on the 14th day of May, A.D. 1927, and prior thereto, was possessed and had control of Exchange Avenue, mentioned in the plaintiff's declaration herein, then it was the duty of the defendant city to keep said Exchange Avenue, and the roadway in reasonably good and safe repair for the safety of passengers passing along and over the same; and if you believe from the preponderance of the evidence in this case, that the defendant city constructed and maintained in, upon and along, a part of said street, a ditch or conduit substantially as charged in the plaintiff's declaration, or some count thereof, and that the same was not constructed and maintained so as to be reasonably safe for persons who had occasion to ride on and over the said street, and that the automobile of the plaintiff Price, in which he was then riding along said street or avenue, unavoidably ran into said ditch or conduit, and by reason thereof, said plaintiff Price, was injured, and has sustained damages in consequence of such injury, then you should find the issues for the plaintiff and assess his damages at whatever sum you may find, from a preponderance of the evidence in this case, said plaintiff is entitled to." In struction 15 direchts a verdict and does not require proof on the part of the plaintiff that he was in the exercise of due care for his own safety just prior to, and at the time of the accident. Said instruction is also defective and erroneous in that it states that it was the duty of the city to keep said Exchange Avenue and the roadway, in reasonably good and safe repair, for the safety of passengers passing along and over the same. This is a higher degree of care than the law requires of a city. It is the duty of the city to use reasonable care to keep its walks and streets in a reasonably safe condition for public travel, by those who are in the exercise of ordinary care

for their own safety. *Graham v. City of Rockford*, 238 Ill. 214-217.

A city is not an insurer of the safety of its streets, nor is it its duty to keep them safe. Its only duty is to use reasonable care to keep them in a reasonably safe condition for ordinary travel thereon, by those who are in the exercise of ordinary care for their own safety.

Gage v. City of Vienna, 196 Ill. App. 585-590; *Village of Lockport v. Licht*, 221 Ill. 35; *City of Salem v. Webster*, 192 Ill. 369; *Boender v. City of Harvey*, 251 Ill. 228.

Instructions which direct a verdict must contain all the material facts or elements, and the failure to include all such facts or elements is fatally erroneous and cannot be cured by giving other instructions. *Gage v. City of Vienna*, supra.

Instructions 12 and 13 are erroneous, and what has been said with reference to 15, applies to instructions 12 and 13.

Instructions 9 and 10 are complained of in the motion for new trial, but were not referred to in the argument, and therefore the objections are waived.

There is no serious error to instruction 5, as it states a correct principle of law. Six (6) is rather general in character and its tendency would be to mislead the jury. Instruction 8 states a correct principle of law, and no serious error in the giving of the same.

Plaintiff also insists that the defendant did not properly assign error as to the giving of his instructions. An examination of the record discloses that this point is not well taken.

It also insisted that the verdict is excessive. It will not be necessary for us to go into this assignment of error as there will have to be another trial.

For the above reasons we are of the opinion that the judgment of the circuit court of Henry County should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

Don't think own history. Question v. City of Richmond, 101 Ill. 288-292.

A city is not an insurer of the safety of its streets, but as it is its duty to keep them safe. It is only duty to see that there is a reasonably safe condition for ordinary travel. However, by those who are in the position of ordinary travel, it is their duty to see that they are safe.

Page v. City of Chicago, 195 Ill. App. 383-386; Village of Lombard v. Chicago, 281 Ill. 57; City of Joliet v. Lombard, 111 Ill. 383; Boardman v. City of Hanover, 201 Ill. 282.

Instructions which direct a verdict must contain all the material facts or elements, and the failure to include all such facts or elements is fatally erroneous and cannot be cured by a jury verdict.

Instructions 12 and 13 are erroneous, and they are hereby set aside with reference to 12, applied to instructions 12 and 13.

Instructions 9 and 10 are contained in the motion for new trial, and were not referred to in the argument, and therefore the objections are waived.

There is no reversible error to instruction 5, as it states a correct principle of law. But 12 is reversible error in that it states a correct principle of law, and no reversible error in the giving of the same.

Instruction 12 is reversible error in that it states a correct principle of law, and no reversible error in the giving of the same.

It also instructed that the verdict in excessive. It will not be necessary for us to go into this matter in error or that will have to be another trial.

For the above reasons we are of the opinion that the judgment of the circuit court of Henry County should be reversed and the

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

8a A
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25 LA 520³

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 13 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MARY KUHRE, Appellee

vs.

DAVID KUHRE, Appellant,

APPEAL FROM THE CIRCUIT
COURT OF BUREAU COUNTY

JONES J:

Mary Kuhre filed a bill of complaint against her husband, David Kuhre, for divorce, alimony, and custody of their minor child. The charge alleged was desertion. The defendant filed an answer and cross bill charging extreme and repeated cruelty. The cause was heard by the court without a jury and a decree was entered in favor of the complainant in the original bill granting her a divorce, the custody of the child, and \$12.50 every two weeks for the support of the child. The sole contention on this appeal is that the evidence does not warrant the decree.

The parties to this suit were married July 23rd, 1921. The husband was an automobile mechanic and lived near LaSalle. His wife was employed at the clock works. Their married life was a turbulent one. Each found considerable fault with the other. The husband's employment was not regular and his earnings were not great. Mrs. Kuhre was compelled to give up her employment on account of sickness and undergo a surgical operation. On January 30, 1923, appellant left her under circumstances which are hereinafter set forth. Appellee has since had the custody of the child and the only support, contributed by her husband, has been under an order of the county court. At the time of the trial, appellee was employed as a housemaid in the family of a physician. She kept her child at the home of her parents where she stayed at night.

On the day of the separation, the parties went to Peru to visit appellee's mother. She testified that on the way, her husband met a Mr. Wilmer and that the men went into a

STATE OF NEW YORK
COUNTY OF NEW YORK

vs.

Gray County filed a bill of complaint against her husband, David Moore, for divorce, alimony, and custody of their minor child. The charge alleged was desertion.

Defendant filed an answer and cross bill charging adultery and requested custody. The case was heard by the county judge.

Out of jury and a decree was entered in favor of the complainant in the original bill granting her a divorce, the custody of the child, and \$12.50 weekly for the support of the child. The sole contention on this appeal is that the evidence does not warrant the decree.

The parties to this suit were married July 28, 1921. The husband was an automobile mechanic and lived near Lathrop. His wife was engaged at the same work. Their married life was a turbulent one. Each took considerable fault with the other. The husband's employment was not regular to give up his employment on account of sickness and fatigue.

Under circumstances which are mentioned in the bill, the wife has since had the custody of the child and the wife, supported, contributed by her husband, has been taken on child at the county court. At the time of the trial, appellee was employed as a housemaid in the family of a physician. She lived at the home of her parents where she worked as night. On the day of the separation, the parties went to New York City to live. The testimony of the husband and the wife was taken and the case was heard by the county judge.

saloon and had a drink; and that upon their way home, they again went into a saloon. Some words passed between Mr. and Mrs. Kuhre about his conduct. Afterwards, they, together with the Wilmers, went to a show. For some reason, appellee did not sit with her husband and guests, but took a seat down in front. When the show was over, and while the parties to this suit were walking down the street, appellee said to her husband, "You are nothing but an old soak.", whereupon, he grabbed her and told her to take it back. She claims that he grabbed her so tight that it made blue marks on her arm and she pushed him in the face. She admits that she picked up some snow and ice and threw at him. A tussle ensued and he picked her up and carried her home. She claims that no further altercation occurred, but that her husband was very angry, went into the house, got his two best suits of clothes and left; that the only scratch or mark she made upon him was a small one upon his face which was caused by her hand. Appellant never returned to his home and appellee was compelled to go to her mother's home. A few months afterwards their child was born in a hospital. The father refused to go to see the mother when it was believed she was in a critical condition. He has seen the child only twice.

In support of appellant's cross bill, he testified that on various occasions his wife had endeavored to use a butcher knife on him; that she threatened to kill him and that she slept with the knife close at hand; that she seldom got breakfast for him; that she frequently went to dances without his consent and stayed out late at nights; that on the day of the separation, while he was endeavoring to turn the key in the door of his home; his wife struck him with a brick and badly dazed him; that he then made up his mind that he would no longer live with her; and that he procured his clothes and went to the Wilmers.

Mr. and Mrs. Wilmer both testified that he came to

...and a faint; and the other child lay down, and
again went into a room. Some time passed between the two
...his comfort. ...
the ... went to a room. For some reason, ...
not sit with her husband and guests, but took a seat alone in
front. When the snow was over, and while the parties to this
... were walking down the street, ... said to her
... "I have nothing but an old book." ...
her and told her to come to him. ...
her to fight that it made him ...
him in the face. ...
and ... and threw at him. ...
up and ... her home. ...
... but that her husband was very angry, ...
...
...
his face which was covered by his hand. ...
... to his home and ...
... a few months after ...
in a hospital. The father ...
when it was believed she was in a ...
... only ...
In support of ...
that on various occasions his wife had ...
... on him; that she ...
she slept with the wife alone at home; that she ...
... that she ...
his consent and stayed out late at night; that on the day of
the separation, while he was endeavoring to turn the key in the
door of his home, his wife ...
... that he then ...
live with him; and that he ...
the ...
... both testified that he came to

their home and fell upon the floor in an unconscious condition; that his head was badly cut, his hair matted with blood, his coat was torn down the back, and that he was unable to leave the house until the next day. He did not tell them of any altercation with his wife. He simply stated that he had been hit with a stone.

After the separation and before the baby was born, complainant wrote to her husband imploring him to take her back, apologizing for her temper, and appealing to him on account of her condition. She also wrote to his mother and asked her to importune him to return, not only on her account, but on account of the unborn baby. These letters were unanswered. Appellee denied that she hit her husband with a brick and denied having threatened to kill him or having threatened him with a butcher knife.

There was little corroborating evidence in the case. It is the general rule that a husband will not be granted a divorce on the ground of extreme and repeated cruelty, unless the proof of the acts is clear and convincing. Slight acts of violence on the part of the wife, where there is no reason to suppose that the husband is not able to protect himself by the exercise of his marital rights, are insufficient to support a decree. The mere violence of the wife from which the husband can easily protect himself is not cruelty. He can protect himself by the use of necessary force, but he must not retaliate by giving blow for blow. (Garrett v. Garrett, 252 Ill. 318 and cases cited.) The sallies of temper displayed by appellee is a proper subject for criticism, but such as they were, they did not justify an abandonment of her by her husband. The chancellor heard the witnesses and it is readily to be inferred from the language of the decree that he did not fully credit appellant's story about being hit with the brick. Whether his wound was one inflicted upon him by his wife or some other person is not very clear from the record. But, however, that may be, the facts do not disclose a situation which would entitle

him to a decree on the ground of extreme and repeated cruelty. His abandonment of his wife was without reasonable cause. (Fritz v. Fritz, 138 Ill. 436; Frank v. Frank, 178 Ill. App. 557.) His desertion was wilful and persisted in. We therefore conclude that the chancellor properly entered a decree in favor of appellee.

Decree affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

592 #
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 T.A. 620⁴

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 20 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MAGGIE FEY OFF, ET AL.	:	
APPELLEES	:	
	:	
VS.	:	APPEAL FROM PEORIA
	:	COUNTY.
EXPOSITION COASTER CO. INC.:	:	
ET AL. JOHN A. MILLER AND	:	
J. W. BETSON,	:	
APPELLANTS.	:	

Jett, J.

This is an appeal from a judgment of the circuit court of Peoria County, holding the appellants John A. Miller and J. W. Betson, in contempt for violating a decree of the circuit court of Peoria County, entered in that court on February 29th, 1928, and punishing said appellants with a fine of \$25.00 each.

The issues in this proceeding arise by reason of a petition, presented on behalf of appellees, in which is set forth the entering of the decree on February 29th, 1928, restraining appellants from further conducting or carrying on an Amusement Park or Amusement Shelter, and the various devices therein contained, in the manner in which the same had been conducted prior to February 29, 1928, or in such manner as would interfere with the reasonable comfort and enjoyment of life by the complainants in the original bill, or other persons of ordinary sensibilities occupying the premises of appellees, through or under them.

The petition then sets forth that on May 27, 1928, the Amusement Shelter, by and through its officers, directors and employees, opened the Park to the public and began operation of the same and of the various amusement devices therein contained and the said Amusement Park was, at the invitation of the Exposition and Amusement Shelter, and its officers, directors, employees and patrons, frequented by the public on the afternoon and evening until eleven o'clock P. M. on said day and again on

EXHIBIT NO. 1
STATE OF TEXAS
COUNTY OF DALLAS
VS.
J. W. BETHAM
ET AL.
APPEALERS

APPEAL FROM JURY VERDICT

This is an appeal from a judgment of the circuit court of Tarrant County, holding the appellants J. W. Betham and J. W. Betham, in contempt for violating a decree of the circuit court of Tarrant County, entered in that court on February 23rd, 1938, and punishing said appellants with a fine of \$50.00 each. The issues in this proceeding arise by reason of a petition, presented on behalf of appellees, in which it was forth the entering of the decree on February 23rd, 1938, restraining appellants from further conducting or carrying on an Amusement Park or Amusement Show, and the various exhibits thereto, in connection, in the manner in which the same had been conducted prior to February 23, 1938, or in any manner as would interfere with the reasonable comfort and enjoyment of life by the complainants in the original bill, or other persons of ordinary sensibilities occupying the premises of appellees, through or under them. The petition then sets forth that on May 27, 1938, the Amusement Show, by and through its officers, directors and employees, opened the Park to the public and began operation of the same and on the various amusement devices therein contained and the said Amusement Park was, at the invitation of the Exposition and Amusement Show, and its officers, directors, employees and patrons, frequented by the public on the afternoon and evening of May 27, 1938, on said day and again on

May 30, 1928; that an advertisement to that effect was inserted in the newspaper inviting the public to attend said Amusement Park; that the roller coaster, described in the original suit in which an injunction was issued, was operated on said days, and continued to operate until ten o'clock and 10:30 P.M. respectively; that the same noise and shrieking emanated on said dates from said roller coaster as emanated therefrom regularly prior to the entry of the decree in the original cause; that the shooting gallery had been changed from the south end of the Amusement Shelter to the north end, almost directly opposite the residence of Appellee, Clarence Off, and the shooting of guns, and striking of metal bullets upon metal backgrounds, continued through the afternoon and evening of each of said days; that a band or orchestra, on each of said two evenings, played continuously in said Amusement Park making loud, and unpleasant noises, which could be distinctly heard in and upon the premises of certain of the petitioners, Off's and Schmoegers; and that in addition thereto on each of the days complained of there was operated a large phonograph, attached to which were amplifiers, which caused the sound therefrom to extend to the residence of the petitioners; that there was a continual clanging of bells in the Amusement Park, by the employees for the purpose of attracting attention to the devices therein; that in addition thereto there was a continual rumble, as of thunder emanating from said park, produced by the operation of the devices; that large numbers of people came to the Park in automobiles and otherwise congregated therein for the purpose of attending the dances held in the Amusement Park, and patronized the various amusement devices; that automobiles of said patrons, were at the direction of the defendant, its officers, agents and employees, parked in great numbers, approximately one hundred and fifty cars, close to the north fence of the premises of Off's; that automobiles of the patrons parked on the north side of a certain

May 30, 1932; that in a statement to that effect was furnished
in the newspaper indicating the public to attend said amusement
park; that the roller coaster, described in the original exhibit
in which an information was issued, was operated on said day, and
continued to operate until ten o'clock and 10:30 P. M. respectively;
17: that the same noise and vibrating emanated on said dates
from said roller coaster as emanated therefrom previously prior
to the entry of the leaves in the original exhibit; that the
shooting gallery had been changed from the north end to the
amusement shelter to the north end, almost directly opposite the
residence of Apples, Clarence Oak, and the shooting of guns,
and striking of metal bullets upon metal backgrounds, continued
through the afternoon and evening of each of said days; that a
band or orchestra, on each of said two evenings, played con-
tinuously in said amusement park during said two evenings;
noises, which could be distinctly heard in and near the residence
of certain of the petitioners, said band and orchestra; that in
addition thereto on each of the days complained of there was
operated a large phonograph, situated so which were amplified,
which caused the sound therefrom to extend to the residence of
the petitioners; that there was a continual ringing of bells
in the amusement park, by the employees for the purpose of
attracting attention to the devices therein; that in addition
thereto there was a continual rattle, as of thunders emanating
from said park, produced by the operation of the device; that
large numbers of people came to the park in automobiles and
otherwise congregated therein for the purpose of attending the
amusement held in the amusement park, and patronized the various
amusement devices; that automobiles of said nature, were on
the location of the defendant, its officers, agents and employees,
parked in great numbers, approximately one hundred and fifty cars,
close to the north fence of the premises of said park; that the
mobiles of the persons parked on the north side of a certain

Boulevard, known as Reservoir Boulevard, in large numbers within 55 yards of the Entrance to the Off premises until near midnight; that loud noises emanated from the cars of the patrons by reason of the honking of horns, starting of engines, and shifting of gears; that a new device since the entry of the decree in the original suit, called "Slide Kelly, Slide" had been installed; that by reason of the fright or thrill caused by going down this device, the patrons indulged in a certain amount of shrieks and noises; that the Park on each of said evenings was brightly illuminated with high powered lights, stationed on the roof of the Shelter; that these lights illuminated the Off's premises, depriving them of the accustomed privacy and making their residence unpleasant to the occupants; that the amusement Park or Amusement Shelter was operated and conducted as a nuisance in the same manner and to the same extent as before the decree in the original cause was entered, and in wilful violation of the terms and provisions of the decree.

The prayer of the petition was for a rule upon the Exposition Amusement Shelter, a corporation, John A. Miller, Charles C. Dickman, J. W. Betson, and Art Webster, and the various employees and persons operating the park, and devices therein to show cause why they should not be adjudged guilty of contempt for violation of the injunction in the original suit.

The petition was sworn to by Maggie Fey Off, and Walter Off, and also supported by the affidavit of Jay McDonnell, a tenant residing on the Off property. In this affidavit McDonnell states that the sounds emanating from the park interferred with ordinary conversation in and upon the Off premises, and that the noises opposite Clarence Off's residence startle and frighten himself and family, and that if the noises, with their accompanying disorderly crowds, clamor, lights and lack of privacy of said premises continue, he will be compelled to remove from the premises.

The petition is further supported by the affidavit of

Chris Straesser and Ward Walker in like manner as McDonnell's affidavit. The petitioner Schmoeger signs a separate affidavit stating that the sounds heard by him at his residence, were of the same intensity and interfered with the reasonable comfort and enjoyment of his premises, the same as the sounds did which emanated from the Amusement Park prior to the entry of the decree in the original suit. One L. J. Robinson makes a supporting affidavit similar to that of Schmoeger.

The Exposition Amusement Shelter, a corporation, answers the rule to show cause, and admits the decree entered in the original suit and that the terms and provisions of that decree were against the operation of the Amusement Park, in the manner in which it was conducted prior to the entry of said decree, or in any way so as to interfere with the reasonable comfort and enjoyment of the complainants, or any person, by through or under them, and admit the operation of the Amusement Park but specifically deny that the operation was in the manner prior to the entry of the decree in the original suit, or in any manner so as to interfere with the reasonable comfort of the complainants in said original suit, or any one in possession of the premises of complainants, by through, or under them.

The answer denies the special charges set forth in the petition; it also denies that any noises or sounds now emanating from the Park or devices therein can be plainly heard by the petitioners in the same manner and in the same degree and with the same intensity as other sounds from the Amusement Park prior to the entry of the decree in the original case, and also denies that the sounds made by the Amusement Park in any way interfere with the reasonable comfort and enjoyment of the petitioners, and avers that as now operated and conducted, the amusement park, nor any of the devices contained therein, constitute a nuisance within the terms and provisions of the decree entered

in the original proceeding.

The answer then sets forth the numerous changes that have been made since the entry of the decree, by reason whereof the noises heretofore complained of have been eliminated. The answer is sworn to by John A. Miller, president of the corporation. It is supported by the affidavit of Albert Johnson, school inspector, in which it is stated that the Exposition Amusement Shelter is being operated in a unusually quiet way, and orderly manner; that the noise, traffic and light, accompanying the operation, would not be objectionable to persons of ordinary sensibilities living on the premises adjacent thereto, and that the operation of the park does not interfere with the reasonable comfort and enjoyment of life, of such person, and in his opinion, does not constitute a nuisance. To the same effect is the affidavit of L. C. Higgs, Supervisor of Trivoli Township, in said county; Irene M. Warner, assistant supervisor, City of Peoria, John A. Herr, assistant supervisor, D. Janssen, assistant supervisor, C. K. Gerdes, assistant supervisor, W. L. Ingram, assistant supervisor, Charles Burk, assistant supervisor, Frank Leach, assistant supervisor, and William Emery, assistant supervisor, all of whom are men in good standing in the community and holders of positions of public trust.

The answer is also supported by affidavit of 61 residents who live within 150 to 600 feet of the Amusement Shelter, in which they state that the noise emanating therefrom has been greatly reduced and diminished since the summer of 1927, and that the park is now being operated in an unusually quiet way, and in a way which does not, on account of noise or otherwise, disturb the affiants at their respective residences, and does not in any way interfere with the reasonable comfort and enjoyment of life by them, and the operation of the Amusement Shelter is not objectionable to them.

in the original proceedings.

The answer then sets forth the numerous changes that have been made since the entry of the decree, by reason whereof the noise heretofore complained of have been eliminated. The answer is sworn to by John A. Miller, president of the corporation. It is supported by the affidavit of Robert Johnson, school inspector, in which it is stated that the Amusement Shutter is being operated in a reasonably quiet way, and that in manner; that the noise, music and light, accompanying the operation, would not be objectionable to persons of ordinary sensibility living on the premises adjacent thereto, and that the operation of the park does not interfere with the reasonable comfort and enjoyment of life, of such person, and in his opinion, does not constitute a nuisance. It is also stated in the affidavit of J. C. Higgs, Supervisor of Buffalo Township, in said county; Irene M. Warner, assistant supervisor, City of Toledo, Ohio; and

supervisor, and William Henry, assistant supervisor, all of whom are now in good standing in the community and holders of licenses of public health.

The answer is also supported by affidavits of 21

residents who live within 150 to 300 feet of the amusement shutter, in which they state that the noise accompanying operation has been greatly reduced and diminished since the summer of 1927, and that the park is now being operated in a reasonably quiet way, and in a way which does not, on account of noise or other line, disturb the residents at their respective residences, and does not in any way interfere with the reasonable comfort and enjoyment of life by them, and the operation of the Amusement Shutter is not objectionable to them.

The answer is also supported by affidavits of 956 persons who have attended the park on the occasions complained of, in which they respectively state that they have visited the Amusement Shelter on the days complained of, and are familiar with the devices operated therein; that by reason of the numerous changes in the grounds of the Amusement Park, by the abandoning of certain amusement devices, and various changes in other respects, the noise emanating therefrom has been greatly reduced and diminished since the summer of 1927; that it is now being operated in an unusually quiet way and in such a way as would not, in the opinion of the respective affiants, interfere with the reasonable comfort and enjoyment of life by persons of ordinary sensibilities living or being on the premises adjacent to or near said Amusement Shelter.

The answer of appellants, J. W. Betson and John A. Miller, while separate, are to the same effect as the answer of the Amusement Shelter and are supported by the same affidavits.

No penalty was imposed upon any of the defendants except the appellants. It is the contention of the appellants, - First, That the order adjudging them to be in contempt of court is against the greater weight of the evidence; that the amusement park was operated within the terms and provisions of the decree and in a lawful manner. Second, That the order adjudging the appellants to be in contempt is erroneous in that it does not specifically find wherein or in what manner the appellants violated the decree entered in the original suit.

The original decree entered which it is insisted the appellants have violated, among other things contained the following order:- "It is further ordered, adjudged and decree by the court that the defendant, Exposition Amusement Shelter, a corporation, The Greater Peoria Exposition, a corporation, John A. Miller and

THE CASE OF THE DEFENDANT

Persons who have attended the party on the occasion mentioned of

and which they respectively state that they have visited the

Applicant's shelter on the days complained of, and are familiar

with the various parties present, and on account of the numerous

persons in the crowd on the various days, it is not possible

to identify any particular person, and the Applicant is not

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Scott C. Diller, each of them, and their representatives, officers, agents, attorneys and employees, and all parties hereafter claiming by, through, or under them, or any of them, be, and they are hereby forever enjoined and restrained from hereafter directly or indirectly, operating, conducting or carrying on said amusement park, or Amusement Shelter and each of the various devices therein contained, in the manner in which the same has been heretofore conducted as aforesaid, or in any such manner as will in any way interfere with the reasonable comfort and enjoyment of life by the complainants or any of them, or any other persons of ordinary sensibilities occupying the premises or any part thereof of the complainants or any of them."

The record shows that the Chancellor who entered the original order in this cause, heard the petition of the petitioners complaining against the appellants to the effect that they had violated the terms of the decree. It would appear from the sworn answers of respondents, with the supporting affidavits that the said Amusement Park as operated since the rendition of the decree is of a much less objectionable character than it was at the time previous to the entering of the decree. The manner of operating has been modified quite materially. The rule is that the decision of the trial court upon affidavits of the respective parties and the witnesses that the injunction has or has not been violated, will not be disturbed by a court of review unless it is clearly and palpably contrary to the evidence so heard.

In *Oehler v. Levy*, 256 Ill. 178, it was claimed that the court below erred in not adjudging the appellees guilty of contempt of court, at page 182 it was said:- "It will be seen from affidavits that they were quite conflicting and that the correct determination of the issue was not without difficulties.

* * * Appellant insists, and in some measure we think with reason, that some, at least of the affidavits, filed in support of the petition were made by persons occupying better positions for

observing the odors and noise to inhabitants in appellant's building than were most of the affidavits filed by appellee. All of the affidavits filed in support of the answer were by persons who lived near the stable or were frequent visitors there and familiar with the condition in which it was kept. Whatever our view might be if it had been submitted to this court to determine the issue in the first instance, we are satisfied from a careful examination of all the affidavits that the decree of the Superior Court was not so palpably contrary to the evidence that as a reviewing court we would be justified in reversing the decree of that court. So long as the injunction is in force it is the duty of appellee to observe it and to conduct his business strictly in accordance with the requirements of said injunctional order, but the court granting the injunction having determined, upon a consideration of all the evidence submitted, that appellee had not violated it, we are unable to say, from the record presented to us, that such determination is clearly and palpably contrary to the evidence."

I In the case of *Boyden v. Boyden*, 162 Ill. App. 77, a similar rule was announced. In the *Boyden* case the appellant was claiming that according to the greater weight of the evidence, he should not have been adjudged guilty of contempt by the court below.

Moreover, the appellant did not deny the congregation of a large number of automobiles as set forth in the petition of appellees. The petition and affidavits of appellees show that not less than one hundred and fifty automobiles were parked within thirty yards of the Off premises on the north, and that a great number of them were parked also along Reservoir Boulevard entrance to the Off premises on the south, some of which did not leave until nearly mid-night; that loud noises emanated from these cars by reason of the honking of horns, starting of engines,

observing the others and notes to transmitters in applicant's building then were sent on the telephone lines of the building. All of the witnesses killed in support of the answer were persons who lived near the estate or were frequent visitors there and familiar with the condition in which it was found. Whatever our view might be as to the admissibility of this

evidence to determine the issue in the first instance, we are satisfied from a careful examination of all the evidence that the issue of the answer could not be helpfully contrary to the evidence that as a reviewing court we would be justified in reversing the decree of that court. So long as the question is in force it is the duty of appellate to observe it and to correct his business strictly in accordance with the requirements of said constitutional order, but the court should not have determined, upon a consideration of all the evidence submitted, that appellee had not violated it, we are unable to say, from the record presented to us, that such determination is clearly and helpfully contrary to the evidence.

I In the case of *Boyd v. Boyd*, 188 Ill. App. 77, a similar rule was announced. In the *Boyd* case the plaintiff was claiming that according to the greater weight of the evidence he should not have been adjudged guilty of conspiracy by the court below.

Moreover, the plaintiff did not deny that a conspiracy of a large number of individuals at and for the purpose of applicant. The petition and affidavit of applicant show that not less than one hundred and thirty individuals were within twenty yards of the OTC premises on the night, and that a great number of them were hurried along toward the entrance to the OTC premises on the night, some of which had not been seen by reason of the lighting of the house, and that of

the shifting of gears and the calling of the occupants thereof. In Phelps v. Winch, 309 Ill. 158, the court held that a dance pavillion situated from 50 to 100 feet distant from complainant's residence constituted a nuisance. With reference to the automobiles that congregated around the dancing pavilion the court said "In addition to the noises in the pavilion, it caused the congregation on and adjacent to the premises of a large number of automobiles, from 50 to 100. It could not be otherwise than that the noise and confusion of starting and getting that number of cars out, so near complainant's residence, at 11 or 12 o'clock at night, would greatly disturb people in the near vicinity. While defendant's business was not unlawful it was not of so useful a character as would justify a denying of the relief prayed."

In view of the rule that the decision of the Chancellor upon affidavits of the parties to the proceeding and the witnesses, that an injunction has or has not been violated, will not be disturbed by a court of review unless it is clearly and palpably contrary to the evidence so heard, we are not prepared to say that the action of the Chancellor in finding the appellants guilty of contempt of court is so clearly and palpably contrary to the evidence so heard, that we would be authorized to reverse the finding, especially so when we take into consideration what was said by the court in Phelps v. Winch heretofore quoted.

It is next urged by appellants that the order adjudging them to be in contempt of court does not specifically find wherein, or in what manner the decree in question, was violated and for that reason they are entitled to reversal.

The order adjudging them guilty of contempt is as follows:- "And now on this day come the said petitioners by Weil, Bartley & Weil, their solicitors, and also come the said respondents, by Messrs. Black and West and Shurtleff and Neihaus and Edward E. Gale, their solicitors, and the court having had this

the striking of blows and the carrying of the defendant's weapon.

In *People v. Smith*, 200 Ill. 133, the court held that a witness

testimony that he saw the defendant strike the victim with a

weapon constituted a nuisance. This testimony is the basis

of the conviction. The court held that the testimony of the

witness is sufficient to sustain the conviction. The court

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cause under advisement, and being fully advised in the premises, doth find that the respondents John A. Miller and J. W. Betson, are guilty of violating the injunction heretofore issued herein and of contempt of court." Appellants relied upon the rule as announced in Franklin Union v. People, 220 Ill. 385. In that case at page 383, the court said; "It is further said the order adjudging Franklin Union No. 4, guilty of contempt was insufficient. The order referred to the petition and the affidavits filed in its support, and in apt terms adjudged Franklin Union No. 4 guilty of a violation of the injunction, setting out the manner of its violation and adjudging it to be in contempt, and imposed upon it a fine of \$1,000. In Fischer v. Hayes, 6 Fed. Rep. 63, Mr. Justice Blatchford says, (p. 70) "It is objected that the order of February 17, 1880, decrees only 'that the defendant is adjudged to have committed the contempt alleged', without reciting further the offense of which he is guilty. It is insisted that this was necessary, and further, that the order should have recited that the defendant had disobeyed a lawful order of the court and was guilty of a contempt of court in so doing. The contempt alleged is set forth with sufficient particularity in the affidavits on which the motion for attachment was founded, and in the report of the Referee. All the proceedings and the various orders are sufficiently connected together by reference and recital to identify the contempt alleged," without the necessity of reciting at length in the order the particulars of the previous proceeding. We think the order adjudging Franklin Union No. 4 guilty of contempt and assessing a fine against it for \$1000 sufficient."

In the Franklin Union case the order contains all the things counsel claims such order must contain. The court in that case merely said that it was sufficient; it did not say that it must contain all that it did. In the Federal case quoted from it appears that the defendant is adjudged to have committed the

contempt alleged, without reciting further the offense of which he is guilty. In the present case the order recites that the petitioners and respondents were before the court. That the court had the matter under advisement and was fully advised, and that the respondents were guilty of violating the injunction.

We are of the opinion that in view of the state of the record that the order adjudging appellants guilty of contempt was sufficient, and complies with the rule announced in the Franklin Union case.

We conclude therefore that the judgment of the circuit court of Peoria County should be affirmed which is accordingly done.

Order affirmed.

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... .. In the present case the order
petitioners and respondents were before the court.
... .. and the latter under
the respondents were guilty of violating the injunction.

... .. No one of the opinion that in view of the
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was sufficient, and complied with the rule announced in the

... .. We conclude therefore that the judgment of the
court of is accordingly

... ..

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2541A 820⁵

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 24 1900 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District.

May Term, A. D. 1929.

Renier Music House (Incorporated).
for the use of Irwin and Ralph
Renier doing business under the
firm name of Renier Bros.,

appellant,

vs.

Alberta Gassman,

appellee.

Appeal from the Circuit Court
of Jo Daviess County.

Opinion by BOGGS, P. J.

Suit was instituted in a justice court of Jo Daviess County by appellant against appellee seeking to recover a balance alleged to be owing on a certain radio set. Appellee filed a counter-claim, seeking to recover the amount paid on said radio. From the judgment rendered in the justice court an appeal was taken to the circuit court, and on the trial there a verdict was returned in favor of appellee and judgment was rendered thereon against appellant, in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

On November 16, 1925, appellee entered into a contract with appellant for the purchase of said radio for the sum of \$202.00, payable \$40.00 cash and \$20.00 per month.

Attached to and made a part of said contract was the following guarantee:

"OUR RADIO GUARANTEE

"We guarantee this radio set to bring in as good general results as any other set, regardless of make, at approximately the same price at the time this set was sold and under the same operating conditions.

"On all guaranteed sets, if necessary to reship set to factory for repairs, we will pack set for said shipment, purchaser to pay all transportation costs, for a period of one year.

In the Appellate Court of Illinois

Second District.

May Term, A. D. 1930.

Renier Minko House (Incorporated).
for the use of Irwin and Ralph
Renier doing business under the
firm name of Renier Bros.,

Appeal from the Circuit Court

of St. Lawrence County.

Appellant,

vs.

Defendant.

Opinion.

Opinion by BOGGS, J. J.

Suit was instituted in a justice court of St. Lawrence County
by appellant against appellee seeking to recover a balance alleged
to be owing on a certain radio set. Appellee filed a counter-claim,
seeking to recover the amount paid on said radio. From the judgment
rendered in the justice court an appeal was taken to the circuit
court, and on the trial there a verdict was returned in favor of
appellee and judgment was rendered thereon against appellant, in
bar of action and for costs. To reverse said judgment, this appeal
is prosecuted.

On November 16, 1928, appellee entered into a contract with
appellant for the purchase of said radio for the sum of \$200.00,
payable \$40.00 cash and \$20.00 per month.

Attached to and made a part of said contract was the following

Guarantee:

"OUR RADIO SETS"

"We guarantee this radio set to burn in as good general
results as any other set, regardless of make, at approximately the
same price at the time this set was sold and under the same opera-
ting conditions.

"On all guaranteed sets, if necessary to replace set to
factory for repairs, we will pack set for said shipment, purchaser
to pay all transportation costs. The amount of such cost

"There is no guarantee on tubes or batteries. We will not recognize any other guarantee or promise as to operation or results made by any salesman or representative.

Renier Musix House."

The testimony of both parties is that said radio set was put in or sold on approval. Mr. Hoffman, a witness for appellant, testified: "The set was put in on approval; I don't recall for just how long." Appellee testified: "He (the salesman for appellant) put it (the radio set) in on approval, and I think about a week or so after, he came over and wanted us to make the payment on it, and I accordingly made that first payment of \$40."

The record discloses that said radio did not work satisfactorily. Complaints were made from time to time by appellee, and service men were sent out by appellant to try and remedy its defects. This condition ran along from November 1925 to March, 1927, when the set was returned to appellant, and so remained up to the time of the trial in the circuit court. In reference to the complaints made, appellee testified: "I started to make complaint a short time after we got the radio, and they told me that if I would put in an eliminator it would do better, and that would cost me \$50. and I put that in; and then it didn't work. * * * They told me if I put a better eliminator and paid \$7.50 more, I would get better results. I bought a charger and they gave me one bulb and then it would not work and they told me that if I had a better tube it would do better and I paid \$4.50 for that. Well, I couldn't do much with it; it didn't compare with other radios; it was noisy and no volume to it. * * * I paid \$180 in all. * * * I never got New York. I never got San Francisco nor Los Angeles. I couldn't get Minneapolis. I couldn't get anything but once in a while Davenport and Des Moines."

The testimony of Andrew Gassman, husband of appellee, is to the same general effect.

On direct examination, Alicia Hoar, a bookkeeper for appellant, testified: "The first time I got in touch with Mrs. Gassman in August (1925). Mrs. Gassman told me the electric eliminator was not working and she wouldn't pay until we repaired that. I know the service man was sent out several times along about that time.

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The testimony of both parties is that said ...
...in on ...
...: "The set was ... in on approval; I don't recall for
... long." Appellee testified: "He (the salesman) for ap-
... but it (the radio set) in on approval, and I think the
... or so after, he came over and wanted us to write the paper
... on it, and I accordingly made that first payment of \$40."

The second disburse that said radio did not work satis-
...ly. Complaints were made from time to time by appellee, and
... This ...
... set was returned to appellant, and no mention up to the time of
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... in; and then it didn't work."

eliminator and paid \$7.50 more, I would get ...
... bought a changer and they gave me one bulb and then it worked
... work and they told me that if I had a better tube it would
... and I paid \$4.50 for that. Well, I couldn't do much with it;
... didn't compare with other radios; it was noisy and no volume.
... * * * I paid \$180 in all. * * * I never got New York. I never
... San Francisco nor Los Angeles. I couldn't get Minneapolis.
... couldn't get anything but once in a while Liverpool and ...
... The testimony of Andrew Cassman, husband of appellee, is

... the same ...
... on ...
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... the ...

The next conversation with Mrs. Gassman was September 21. Mrs. Gassman said the set is not working, 'will pay when set is fixed.' That was in September. I remember after speaking with Mrs. Gassman, our man was over there, our expert service man going over there and checking the set. As to our next conversation, I recall on October 8. As to our next conversation, I recall on October 21. On the 21st of October I agreed to send the repair man over to Gassman's on the following Thursday morning. I had a conversation with her after that. * * * On the 4th of November 1926 I phoned and my notes show everything was O. K. 'will be in in a few days and make payment.' Four days later she came in and made a payment of \$20. That is the last payment. After that I had several phone calls, one on the 6th of January 1927."

On direct examination Frank C. Hoffman, witness for appellant, testified that after the installation of said radio, he had a talk with "both of the Gassmans. They sent for me one day and told me that they had some prospects for me; they said the general talk was in East Dubuque that it was the best set that was ever sold in East Dubuque, and they had some people that wanted to buy sets like it. * * * I was in their place of business after the radio was installed. I heard it operate. They were getting coast to coast reception on it, Atlantic and Pacific and southern stations. That was within a period of several weeks after installation. I tested it myself; I operated it. No complaint was made by Mrs. Gassman at that time. Later on she did."

At the close of all the evidence a motion was made by appellant for a directed verdict, which motion was denied. At the same time, appellee made a motion for a directed verdict for the amounts paid by her on said radio, which motion was denied. While the verdict was in favor of appellee, it was general and did not find that she was entitled to recover anything against appellant.

It is strenuously insisted by counsel for appellant that the court erred in denying its motion for a directed verdict. In this connection it is insisted that the contract for the sale of said radio was executed; therefore that appellee could not rescind said contract except for fraud, and whatever rights she had, 'if any, were

The next conversation...
...and he is...
...own expert...
...the...
...the...

6. As to our next conversation, I recall on October 21. On the
21st of October I agreed to meet the person over to...
on the following Thursday morning. I had a conversation with her
after that. * * * On the 4th of November 1932 I phoned and we
show everything was O.K. 'I will be in in a few days and make my
month.' Four days later she came in and made a payment of \$20.
That is the last payment. After
one on the 6th of January 1937."

On direct examination Frank C. Holtman, witness for appel-
lant, testified that after the installation of said radio, he
told him "date of the..."
me that they had some prospects for me; they said the General
was in West Virginia that it was the best job that was ever sold in
West Virginia, and they had some people that wanted to pay more for
it. * * * I was in their place of business after the radio was in-
stalled. I heard it operate. They were getting coast to coast
reception on it, Atlantic and Pacific and...
was within a period of several weeks after installation. I heard
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court erred in denying the motion for a directed verdict. In this
connection it is insisted that the evidence for the appellee was
radio was...
...and...
...and...
...and...

for a breach of the contract of warranty.

Section 72 of chapter 121a, Cahill's Statutes, paragraph 1, provides:

"(1) Where there is a breach of warranty by the seller, the buyer may, at his election - -

"(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.

"(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of the warranty.

"(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty.

"(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

Paragraph 3 of said section among other things provides:

"(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind."

Counsel for appellant stresses the fact that said radio was not returned until some sixteen months after its delivery, and that numerous payments had been made thereon after appellee had complained that said radio was not working satisfactorily. It is contended that the court should hold as a matter of law that appellee had waived the right to rescind said contract; that the court should have so found, and should have directed a verdict in favor of appellant, there being no evidence disclosing appellee's damages from the breach of said warranty.

Ordinarily, the question as to whether a buyer acts within a reasonable time after discovering a breach of warranty which would entitle him to rescind, is a question for the jury.

In Conner v. Borland Grannis Company, 294 Ill. 58, suit had been instituted by one Elspeth M. Conner to recover the amount paid

by her on an electric brougham, delivered to her on the last of June, 1913. \$200 was paid at that time, and a chattel mortgage and notes secured thereby, coming due every thirty days, were executed by her for the balance. The court at page 60 says:

"Plaintiff in error (Mrs Conner) claimed that the car was not according to contract but made payments until October 9, 1913, when she gave her check for \$204, on which she indorsed that the payment was under protest, on condition that the payee should furnish her with a car as contracted and subject to her approval. The check was immediately returned and the car was taken under the chattel mortgage and was sold on October 25, 1913, for \$1,350. The plaintiff in error brought her suit in the superior court of Cook County and recovered a judgment for \$1850, the amount she had paid on the purchase of the car, together with costs."

The case was appealed to the Appellate Court for the First District, where a judgment was entered, reversing without remanding said cause. On writ of certiorari, the case was taken by the Supreme Court. At page 62 the court says:

"It is a rule of law that if a purchaser desires to rescind a contract of sale and return the article purchased he must offer it back as soon as he discovers the breach or after he has had a reasonable time for examination, and he waives the right to rescind by continuing to use the article for a longer time than is reasonable for a trial and must have recourse to his action for damages in a suit for a breach of warranty or as a defense to a suit for the contract price. (Underwood v. Wolf, 131 Ill. 425; 2 Benjamin on Sales, sec. 1356.) The alleged defects in this car which the evidence for the plaintiff tended to prove could only be discovered by use by the plaintiff. The question whether she retained the car longer than was reasonably necessary depended upon all the facts and circumstances in evidence. (Doane v. Dunham, 79 Ill. 131.) The law fixes no time for the return of an article under such conditions, and it was a question for the jury to decide from the evidence whether the retention of the car, which was returned several times to the service station and repaired at other times, was for more than a reasonable time for the plaintiff

to decide whether she would keep the car or not. Such a question could only be one of law for a court if the circumstances were such that all reasonable minds would agree that the car was retained under such conditions that there would be a waiver of the right to rescind, and surely that was not the case here."

The record in the present case discloses that, while appellee retained the radio set in question for a period of some sixteen months, she was continually insisting that it was not giving satisfaction and was not according to contract. The testimony on the part of appellant's bookkeeper corroborates appellee's testimony in this regard. While appellee made payments on said radio, after she had discovered that the warranty had been breached, such payments were generally shown to have been made at the time the service men of appellant were sent out to place the radio in condition; in other words, while appellee was making these payments, appellant was contemporaneously undertaking to make said ~~xxxx~~ radio comply with its warranty. Such being the state of the record, we are not prepared to say as a matter of law that appellee by unreasonable delay had waived her right to rescind. Under the facts disclosed by this record, it was a question for the jury to determine, and we are not prepared to say that their finding was against the manifest weight of the evidence. The witness Campbell, who testified on behalf of appellant, stated that said radio set was sold on approval; that he called around some six weeks or two months thereafter. This was a circumstance as tending to show the length of time appellee had in which to test out said radio. The evidence discloses that, before the end of six weeks, appellee had made complaint to appellant that the set was not working satisfactorily. It is also a circumstance that the jury had a right to consider in determining appellee's right to rescind that, so far as the record discloses, appellant has retained said radio, had it at the time of said trial and made no tender of it back to appellee, either before said trial or up to the time said motion was made to direct a verdict.

The only other question referred to by appellant in its

to resign, and surely that was not the case here."

The record in the present case discloses that, while appellant

retained the radio set in question for a period of some months,

months, she was continually insisting that it was not giving

satisfaction and was not according to contract. The testimony on

the part of appellant's bookkeeper corroborates appellee's testi-

mony in this regard. While appellee made payments on said radio

set, the warranty has been breached, and the payments were

generally shown to have been made at the time the

service men of appellant were sent out to place the radio in

operation; in other words, while appellee was making those payments,

appellant was not complaining of any defect in the radio, but

comply with its warranty. From being the basis of the record,

and not prepared to say as a matter of law that appellee's

able delay had waived her right to resign. Under the facts

closed by this record, it was a question for the jury as to

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fied on behalf of appellant, stated that said radio set was

on approval; that he called around some six weeks on two months

thereafter. This was a circumstance as tending to show the

of time appellee had in which to test out said radio. The evi-

dence shows that, before the end of six weeks, appellee had made

no complaint of any kind, and that she had not returned the radio

it is also a circumstance that she had not returned the radio

in appellant's possession, and that she had not returned the

radio to appellant, and that she had not returned the radio

the time of said trial, and that she had not returned the

radio to appellant, and that she had not returned the

radio to appellant, and that she had not returned the

radio to appellant, and that she had not returned the

printed argument is that the verdict of the jury is inconsistent; in other words, it is insisted that the jury should have found appellant was entitled to recover the balance of said purchase money, or that appellee was entitled to a verdict for the amount paid by her on said radio. No cross errors were assigned by appellee, so she is not in a position to complain and is not complaining that a verdict was not returned in her favor for the amount she had paid, and appellant is not in a position to make such complaint as the failure to return a verdict for appellee for said amount was of benefit to it. Becker v. People, 164 Ill. 267-278; Morgan v. Wright, McCaslin, 114 App. 427-431, affirmed 213 Ill. 358; Jones v. Bates, 179 App. 578-584; Heyman v. Heyman, 210 Ill. 524-540.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



In The
APPELLATE COURT OF ILLINOIS
Second District

May Term, A. D., 1929

East Butte Copper Mining Company, a corporation,)	Appellant,)	Appeal from the Winnebago County Circuit Court
vs.				
G. L. Cole,		Appellee.)	

OPINION by BOGGS, P. J.

An action in assumpsit was instituted by appellant against appellee in the Circuit Court of Winnebago County to recover the amount alleged to have been expended by appellant for witness fees, court costs, attorneys' fees and other expenses incident to defending three certain suits brought against it, and for the amount alleged to have been paid to compromise one of said suits.

The declaration consisted of the common counts, accompanied by an affidavit of claim. To the declaration appellee filed a plea of the general issue, supported by affidavit.

At the close of all the evidence, a motion was made by appellee that the evidence be excluded and a verdict directed in its favor, which motion was allowed, and judgment was rendered on the directed verdict against appellant, in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

Said cause of action was based on a contract entered into between appellant and appellee, which contract entered into between appellant and appellee, which contract, among other things, provided:

"This Agreement made this 15th day of August, 1923, between G. L. Cole of the City of Springfield, State of Missouri, party of the first part, and East Butte Copper Mining Company, a corporation duly organized under the laws of the State of Arizona, and having a usual place of business in the City of Boston, in the State of Massachusetts, party of the second part;

"Whereas the party of the first part was the owner or con-

"the stock of the Silver Plume Mines Company, a

corporation duly organized under the laws of the State of Missouri, and having a usual place of business in the City of Springfield, in said State; and

"Whereas the value of said stock depends largely on whether or not there are outstanding obligations against said Silver Plume Mines Company; and

"Whereas the said G. L. Cole for the purpose of affecting said sale has represented unto the party of the second part that there are no outstanding obligations against said Silver Plume Mines Company; and

"Whereas on the strength of said representations the party of the second part has purchased all the stock of the said Silver Plume Mines Company; and

"Whereas the party of the first part was owner of the entire property formerly known as the Dives-Seven-Thirty Mining & Milling Company including the mill^{and mill} sites situated at Silver Plume in Clear Creek, Colorado, and conveyed said property to the said Silver Plume Mines Company.

"Now, therefore, in consideration of the purchase of said stock by the party of the second part and one dollar and other valuable considerations paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, the said parties have covenanted and agreed and do hereby covenant and agree to and with each other as follows:

"1. The party of the first part hereby guarantees that there are no outstanding claims or obligations against said Silver Plume Mines Company, and he hereby undertakes and agrees to save and hold the party of the second part harmless from any and all loss, damage, or expense occasioned by any claims or demands which may be outstanding against the said Silver Plume Mines Company."

Said contract was offered in evidence by appellant, and admitted without objection. Appellant also offered in evidence exemplified copies of the complaints in the three suits above mentioned, filed in the district court of the city and county of Denver, Colorado.

The first of said complaints set forth that on October 7, 1921, the defendant (Silver Plume Mines Company), being the

owner of a contract and option to purchase certain mining property called 'Dives-Pelican Property', employed as brokers one McLain, Goodstein and Whitehead to initiate a purchase, lease or other contract for the disposal of said property; that it was agreed that the defendant should pay, as compensation, ten per cent of the sum realized as commission; that thereafter said brokers began negotiations for the defendant with the East Butte Copper Mining Company to purchase said property for \$150,000; that said sale was finally fully consummated; that said McLain assigned his claim to the plaintiff, the Todd-McLain Company, and judgment is claimed for \$5,000, together with interest."

The other complaints were of like character. On the statement of counsel for appellant that they were not offering any other or additional part of the record in said causes, the court refused to admit said documents in evidence. It is insisted that the court erred in this ruling. In view of the limited character of the offer, which as limited, did not show service, the issues involved, or final disposition of the causes, the court did not err in its ruling.

The only testimony offered on behalf of appellant was contained in the depositions of William P. Everts, William A. Paine, and B. F. Reed. All of said witnesses were asked questions and made answers as to what was said by the officers of appellant company and by appellee, leading up to the execution of said contract. On objection, the court ruled that said testimony was not admissible. Appellant contends that the court erred in so ruling, it being insisted that this testimony should have been admitted as tending to show the intention of the parties at the time of the execution of said contract.

"The parties having reduced their agreement to writing, the written agreement is presumed to contain all the terms of the contract, and no promise can be implied contrary to the written terms." American National Bank v. Holsen, 331 Ill. 622-630.

"The law is well settled that when parties reduce to

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writing their agreement, as finally agreed upon by them; all prior negotiations leading up to the execution of the writing are merged in the writing, and that parol evidence is not admissible to explain, contradict, enlarge or modify the writing as it existed when executed. The writing when executed becomes the repository of the agreement between the parties." Davis v. Fidelity Fire Insurance Co., 208 Ill. ~~33~~ 375-382.

"Where parties have deliberately put their contract into writing, the rule doubtless is that the writing is the exclusive evidence of what the contract is." Memory v. Niepert 131 Ill. 623-630. See also Hunter v. Gates, 227 App. 105-107; Boylan v. Cameron, 126 App. 432-437; 13 Cor. Jur., sec. 616, p. 597.

The effect of the offered testimony would be to enlarge or vary the terms of the written contract. The court therefore did not err in excluding said testimony.

In the offered testimony of the witness Reed, he stated that he was the attorney representing appellant in said litigation; that something over \$3,000 had been expended in attorneys' fees, witness fees, court costs, etc., and in making said compromise, and that it was necessary to make such expenditures. A considerable portion of said expenditures consisted of expenses of witnesses called from other states. No evidence was offered to show what said witnesses testified to, that their testimony was material, or even as to what issues were being tried.

At the close of all the evidence, the following motion was made by appellant:

"Now comes the plaintiff, at the close of all the evidence, and moves the court to instruct the jury to find the issues for the plaintiff and assess the plaintiff's damages at the sum of Seven Hundred Fifty Dollars (\$750.00)."

As a part of said motion, appellant tendered the following instruction:

"The court instructs the jury to find the issues for the plaintiff and assess the plaintiff's damages at Seven Hundred Fifty Dollars (\$750.00)."

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Said motion was denied, and said instruction refused, and appellant then made the following motion:

"Now comes the plaintiff, at the close of all the evidence and moves the court to instruct the jury to find the issues for the plaintiff and assess the plaintiff's damages at such sum as they may find from the evidence the plaintiff spent or caused to be spent in defending the claims for commissions filed by Todd-McLain Co., A. Goodstein and Andrew Whitehead, and A. H. Cross, including any money that the plaintiff spent or caused to be spent in settling or compromising the claim of Todd-McLain Co."

As a part of said motion, appellant tendered the following instruction:

"The court further instructs the jury that if they find from the evidence that the plaintiff paid Seven Hundred Fifty Dollars (\$750.00) to settle and compromise the claim or suit filed by Todd-McLain Co. against Silver Plume Mines Co., and that the defendant had notice of payment of said money and either acquiesced to it or did not object, then your verdict should be for the plaintiff in said sum of Seven Hundred Fifty Dollars (\$750.00)."

This motion was also denied, and said instruction refused, and it is assigned as error that the court erred in its rulings on said motions.

Appellant's statement of the case contains the following:

"The errors relied upon are that the Court improperly refused to admit the evidence above mentioned, improperly construed the said contract of August 15, 1923, and improperly directed the jury to find the issues in favor of the defendant."

As appellant has waived the assignment of error on the rulings on its motions for a directed verdict, it will not be necessary for us to consider the same. It might be observed, however, that appellant, having specifically moved for a directed verdict for \$750, cannot complain of the action of the court in overruling its subsequent motion for a directed verdict for the amount of said court costs, witness fees, attorneys' fees, and said \$750. The only question that could be raised on these

Before the Court is the Defendant's Motion to Dismiss the Complaint.

The Defendant moves to dismiss the Complaint on the grounds that:

1. The Complaint fails to state a claim for which relief may be granted.

2. The Complaint is barred by the statute of limitations.

3. The Complaint is barred by the doctrine of res judicata.

4. The Complaint is barred by the doctrine of laches.

5. The Complaint is barred by the doctrine of estoppel.

6. The Complaint is barred by the doctrine of acquiescence.

7. The Complaint is barred by the doctrine of waiver.

8. The Complaint is barred by the doctrine of estoppel in rem.

9. The Complaint is barred by the doctrine of estoppel in personam.

10. The Complaint is barred by the doctrine of estoppel in pais.

11. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

12. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

13. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

14. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

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32. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

33. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

34. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

35. The Complaint is barred by the doctrine of estoppel in negotiorum gestorum.

motions is whether the court erred in refusing to direct a verdict for \$750. Without going into a discussion of this question, it is only necessary to say that the evidence in the record was not of that character that would warrant the court in so directing such verdict, and the court did not err in said ruling.

It is next insisted that the court erred in excluding the evidence and in directing a verdict for appellee. This assignment of error presents the most serious question raised on the record.

The witness B. F. Reed, being the attorney who conducted the litigation for appellant in connection with said alleged claims, testified to the effect that, in his opinion as a lawyer, there was some question with reference to the liability of the Silver Plume Mines Company in connection with the claim for which suit was instituted by the Todd-McLain Company. He also testified on cross examination that this case was settled for \$750, before it came to trial; that "as a representative of the Silver Plume Mines Company and as its attorney, and after careful investigation in the claim asserted by the Todd-McLain Company, I was of the opinion, as of the time the compromise was made and prior thereto, that the claim had some merit, in view of the litigation which had preceded it, based upon the same claim." He was asked:

"Was there any authority of any kind ever received from Mr. Cole by the East Butte Copper Mining Company, concerning a settlement of the Todd-McLain asserted claim?"

His answer was: "When you said 'authority of any kind', I will have to answer that Mr. Cole knew of the contemplated settlement before it was made, having acquired that knowledge from me, and he approved of such settlement and told me that he thought it was the best and easiest way out of it."

With this uncontradicted evidence in the record, we hold that the court erred in excluding the evidence and directing a verdict for appellee. The question as to whether the suit based on said claim was compromised with the knowledge and consent of appellee should have been submitted to the jury. If the jury should find that it was so compromised, we see no reason

1
why appellee would not be liable for the amount so paid to compromise said claim.

One of the sharply contested questions raised by counsel for the respective parties is a question of law, as to whether the provisions of said contract were broad enough to render appellee liable for all claims existing against the Silver Pine Mines Company, whether valid or invalid. Counsel for appellant insist that, under the provisions of said contract, appellee covenanted to save harmless appellant against all claims of whatsoever character, valid or invalid. On the other hand, counsel for appellee insist that contracts of indemnity should be strictly construed, and that, for that reason, this court should hold that the provisions of said contract had to do only with outstanding valid claims or obligations.

Inasmuch as this cause will have to be retried, we have deemed best to give construction to said contract on the point raised. While the rule is that contracts of indemnity are to be strictly construed, that does not mean that such contracts shall not be given the legal effect that their unambiguous language warrants. *City of Sterling v. Wolf*, 163 Ill. 467-470; *Lawrence v. Wendmacher*, 200 App. 32-34; *Evans v. Illinois Surety Co.*, 209 App. 465-471; *Helebrandt v. Sebesta*, 236 App. 461-463; *Alexander Lumber Co. v. Aetna Accident & Liability Co.*, 296 Ill. 500-504.

We hold that the contract in question is broad enough to render appellee liable for all claims existing at the time of its execution, where the validity or enforceability of the same could be said to be a matter of reasonable question.

For the reasons above set forth, the judgment of the trial court will be reversed, and the cause will be remanded.

Reversed and remanded.

TO THE SECRETARY OF THE ARMY

FROM THE SECRETARY OF THE ARMY

SUBJECT: [Illegible]

REFERENCE: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

7. [Illegible]

8. [Illegible]

9. [Illegible]

10. [Illegible]

11. [Illegible]

12. [Illegible]

13. [Illegible]

14. [Illegible]

15. [Illegible]

16. [Illegible]

17. [Illegible]

18. [Illegible]

19. [Illegible]

20. [Illegible]

21. [Illegible]

22. [Illegible]

23. [Illegible]

24. [Illegible]

25. [Illegible]

26. [Illegible]

27. [Illegible]

28. [Illegible]

29. [Illegible]

30. [Illegible]

31. [Illegible]

32. [Illegible]

33. [Illegible]

34. [Illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25 I.A. 621²

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In The

1110

— — — — —

vs.

Appeal from the
Circuit Court of
Peoria County.

DATE _____

Appellant filed a bill in the circuit court of Peoria County against appellees, setting forth among other things that Wilbert I. Slemmons, husband of appellant, died testate on December 5, 1918; that, among other property, appellant was devised something over 4,000 acres of land in Brevard county, Florida; that shortly after the death of her husband, appellee Dime Savings & Trust Company was appointed administrator with the will annexed of said estate; that, not being experienced in the matter of business, appellant placed the management of her affairs with said trust company; that in the early part of 1923 she took up with C. W. Frazier, the trust officer of said trust company, the matter of negotiating a sale of said Florida lands; that a contract of agency was entered into with appellee John W. McDowell for procuring a sale of said lands, he, the said McDowell, to have as his commission 10% of the amount of any sale that might be made; that, pursuant thereto, on August 3, 1923, a thirty day option was given to appellee Joseph K. Birttain to purchase said lands for \$35,000; that said option was not acted on; that about September 6, appellant was advised by said trust company that Birttain was no longer interested in said property, but that they were negotiating with other prospective purchasers; that in September, 1923, a contract was signed, whereby appellant was to convey said property to appellee

6862, 6863, 6864, 6865, 6866, 6867, 6868, 6869, 6870, 6871, 6872, 6873, 6874, 6875, 6876, 6877, 6878, 6879, 6880, 6881, 6882, 6883, 6884, 6885, 6886, 6887, 6888, 6889, 6890, 6891, 6892, 6893, 6894, 6895, 6896, 6897, 6898, 6899, 6900, 6901, 6902, 6903, 6904, 6905, 6906, 6907, 6908, 6909, 6910, 6911, 6912, 6913, 6914, 6915, 6916, 6917, 6918, 6919, 6920, 6921, 6922, 6923, 6924, 6925, 6926, 6927, 6928, 6929, 6930, 6931, 6932, 6933, 6934, 6935, 6936, 6937, 6938, 6939, 6940, 6941, 6942, 6943, 6944, 6945, 6946, 6947, 6948, 6949, 6950, 6951, 6952, 6953, 6954, 6955, 6956, 6957, 6958, 6959, 6960, 6961, 6962, 6963, 6964, 6965, 6966, 6967, 6968, 6969, 6970, 6971, 6972, 6973, 6974, 6975, 6976, 6977, 6978, 6979, 6980, 6981, 6982, 6983, 6984, 6985, 6986, 6987, 6988, 6989, 6990, 6991, 6992, 6993, 6994, 6995, 6996, 6997, 6998, 6999, 7000, 7001, 7002, 7003, 7004, 7005, 7006, 7007, 7008, 7009, 7010, 7011, 7012, 7013, 7014, 7015, 7016, 7017, 7018, 7019, 7020, 7021, 7022, 7023, 7024, 7025, 7026, 7027, 7028, 7029, 7030, 7031, 7032, 7033, 7034, 7035, 7036, 7037, 7038, 7039, 7040, 7041, 7042, 7043, 7044, 7045, 7046, 7047, 7048, 7049, 7050, 7051, 7052, 7053, 7054, 7055, 7056, 7057, 7058, 7059, 7060, 7061, 7062, 7063, 7064, 7065, 7066, 7067, 7068, 7069, 7070, 7071, 7072, 7073, 7074, 7075, 7076, 7077, 7078, 7079, 7080, 7081, 7082, 7083, 7084, 7085, 7086, 7087, 7088, 7089, 7090, 7091, 7092, 7093, 7094, 7095, 7096, 7097, 7098, 7099, 7100, 7101, 7102, 7103, 7104, 7105, 7106, 7107, 7108, 7109, 7110, 7111, 7112, 7113, 7114, 7115, 7116, 7117, 7118, 7119, 7120, 7121, 7122, 7123, 7124, 7125, 7126, 7127, 7128, 7129, 7130, 7131, 7132, 7133, 7134, 7135, 7136, 7137, 7138, 7139, 7140, 7141, 7142, 7143, 7144, 7145, 7146, 7147, 7148, 7149, 7150, 7151, 7152, 7153, 7154, 7155, 7156, 7157, 7158, 7159, 7160, 7161, 7162, 7163, 7164, 7165, 7166, 7167, 7168, 7169, 7170, 7171, 7172, 7173, 7174, 7175, 7176, 7177, 7178, 7179, 7180, 7181, 7182, 7183, 7184, 7185, 7186, 7187, 7188, 7189, 7190, 7191, 7192, 7193, 7194, 7195, 7196, 7197, 7198, 7199, 7200, 7201, 7202, 7203, 7204, 7205, 7206, 7207, 7208, 7209, 7210, 7211, 7212, 7213, 7214, 7215, 7216, 7217, 7218, 7219, 7220, 7221, 7222, 7223, 7224, 7225, 7226, 7227, 7228, 7229, 7230, 7231, 7232, 7233, 7234, 7235, 7236, 7237, 7238, 7239, 7240, 7241, 7242, 7243, 7244, 7245, 7246, 7247, 7248, 7249, 7250, 7251, 7252, 7253, 7254, 7255, 7256, 7257, 7258, 7259, 7260, 7261, 7262, 7263, 7264, 7265, 7266, 7267, 7268, 7269, 7270, 7271, 7272, 7273, 7274, 7275, 7276, 7277, 7278, 7279, 7280, 7281, 7282, 7283, 7284, 7285, 7286, 7287, 7288, 7289, 7290, 7291, 7292, 7293, 7294, 7295, 7296, 7297, 7298, 7299, 7300, 7301, 7302, 7303, 7304, 7305, 7306, 7307, 7308, 7309, 7310, 7311, 7312, 7313, 7314, 7315, 7316, 7317, 7318, 7319, 7320, 7321, 7322, 7323, 7324, 7325, 7326, 7327, 7328, 7329, 7330, 7331, 7332, 7333, 7334, 7335, 7336, 7337, 7338, 7339, 7340, 7341, 7342, 7343, 7344, 7345, 7346, 7347, 7348, 7349, 7350, 7351, 7352, 7353, 7354, 7355, 7356, 7357, 7358, 7359, 7360, 7361, 7362, 7363, 7364, 7365, 7366, 7367, 7368, 7369, 7370, 7371, 7372, 7373, 7374, 7375, 7376, 7377, 7378, 7379, 7380, 7381, 7382, 7383, 7384, 7385, 7386, 7387, 7388, 7389, 7390, 7391, 7392, 7393, 7394, 7395, 7396, 7397, 7398, 7399, 7400, 7401, 7402, 7403, 7404, 7405, 7406, 7407, 7408, 7409, 7410, 7411, 7412, 7413, 7414, 7415, 7416, 7417, 7418, 7419, 7420, 7421, 7422, 7423, 7424, 7425, 7426, 7427, 7428, 7429, 7430, 7431, 7432, 7433, 7434, 7435, 7436, 7437, 7438, 7439, 7440, 7441, 7442, 7443, 7444, 7445, 7446, 7447, 7448, 7449, 7450, 7451, 7452, 7453, 7454, 7455, 7456, 7457, 7458, 7459, 7460, 7461, 7462, 7463, 7464, 7465, 7466, 7467, 7468, 7469, 7470, 7471, 7472, 7473, 7474, 7475, 7476, 7477, 7478, 7479, 7480, 7481, 7482, 7483, 7484, 7485, 7486, 7487, 7488, 7489, 7490, 7491, 7492, 7493, 7494, 7495, 7496, 7497, 7498, 7499, 7500, 7501, 7502, 7503, 7504, 7505, 7506, 7507, 7508, 7509, 7510, 7511, 7512, 7513, 7514, 7515, 7516, 7517, 7518, 7519, 7520, 7521, 7522, 7523, 7524, 7525, 7526, 7527, 7528, 7529, 7530, 7531, 7532, 7533, 7534, 7535, 7536, 7537, 7538, 7539, 7540, 7541, 7542, 7543, 75

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Brittain for the sum of \$20,000; that thereafter, on December 4, 1923, a deed was executed pursuant thereto.

Said bill charged that a fiduciary relation existed between appellant and said trust company and its officers; that no bona fide effort had been made to sell said property, and that, in violation of said fiduciary relation, she was procured to enter into said contract; "that the said John W. McDowell, George J. Jobst and Joseph K. Brittain did, after they obtained the title to said real estate from your oratrix to the said Joseph K. Brittain as hereinabove set forth, sell and convey the said real estate, through the said Joseph K. Brittain, on or about the 7th day of January, A. D., 1926, for the sum of, to-wit, \$242,000 net to them, over and above incumbrances thereon, and did thereby then and there make a profit by virtue of the premises hereinabove set forth in the sum of \$222,000. Appellant prayed that appellees be required to account to her for the profits made by them in connection with said transaction.

All of the appellees answered said bill, admitting that appellees McDowell and Jobst were equally interested with Brittain in said purchase; denying that a fiduciary relation existed; denying all charges of fraudulent conduct, alleging that appellant acted upon her own judgment, with ~~fully~~ full knowledge of the identity of the purchasers, and that "it is uncertain whether any profits will be realized from the resale." Said answer further set forth that a deed was executed by appellant in February, 1926, to the grantee of appellee Brittain, to cure certain defects in the title to said premises, and that it amounted to a confirmation of her former deed.

The cause was referred to a special master to take and report the evidence, with his findings of fact and his conclusions thereon. After the hearing before the master had been closed appellees amended their answer by adding an allegation that appellant had speculated on her right to rescind, and was guilty of laches. Thereupon appellant amended her bill by adding certain charges of fraudulent conduct not appearing in the original bill, and alleging that she learned thereof at the hearing in said cause; charging that the fiduciary relationship set forth in the original bill continued after the transaction in question was ended.

Brittain for the sum of \$20,000; that transaction, on January 1,

1936, a deed was executed pursuant thereto.

Said bill charged that a fiduciary relation existed

between appellant and said trust company and its officers; that

no bona fide effort had been made to sell said property, and

that, in violation of said fiduciary relation, she was procured

to enter into said contract; "that the said John W. McDowell,

George J. Jobst and Joseph L. Brittain did, after their obtaining

the title to said real estate from your grantor to the said

K. Brittain as hereinafter set forth, sell and convey the said

real estate, through the said Joseph L. Brittain, on or about

the 7th day of January, A. D., 1936, for the sum of \$20,000,

\$20,000 net to them, over and above expenses thereon, and

did thereby then and there make a profit by virtue of said

premises hereinafter set forth in the sum of \$20,000. Appellant

prayed that appellee be required to account to her for the

profits made by them in connection with said transaction.

All of the appellee answered said bill, admitting that

appellant owned the real estate described in said bill,

that it is now owned by said appellee, and that

exists; denying all charges of fraudulent conduct, alleging that

appellant acted upon her own judgment, with her full knowledge

of the identity of the purchasers, and that "it is uncertain

whether any profits will be realized from the resale.

Answer further set forth that a deed was executed by appellant

in February, 1936, to the grantee of appellee, and that

some certain defects in the title to said premises, and that

it amounted to a confirmation of her former deed.

The cause was referred to a special master to take and

report the evidence, with his findings of fact and his conclusions

thereon. After the hearing before the master had been closed

appellee amended their answer by adding an allegation that

appellant had speculated on her right to resell, and was

guilty of fraud. Thereupon appellant amended her bill by

adding certain charges of fraudulent conduct and alleging that

the appellee, and its officers, had acted in a fraudulent manner,

No question has been raised by either party as to the sufficiency of the pleadings. It is therefore unnecessary for us to set them forth in greater detail. The evidence was taken and reported by the master, with his conclusions thereon, and with a recommendation that appellant's bill be dismissed for want of equity. On hearing on exceptions to said report, the court sustained the master on all material matters, except as to the finding that the deed from appellant to the grantee of Brittain amounted to a ratification and confirmation of her previous deed. The court sustained an exception to this finding. A decree was entered, dismissing appellant's bill for want of equity. To reverse said decree, this appeal is prosecuted.

Appellant is a woman about sixty years of age. The court found that, after the settlement of her husband's estate, she was the owner of some \$50,000 in securities, a home worth about \$25,000, the lands here involved, and some 2,353 acres of land in Duval county, Florida. In practically all of her business affairs, appellant conferred with and took the advice of Frazier, the trust officer of appellee Dime Savings & Trust Company.

In 1922 a drainage district was organized, taking in the 4,110 acres of land in Brevard county owned by appellant. Said land was assessed a total of \$129,476.25. Said assessment was spread over a term of twenty-five years. The aggregate interest ~~on~~ on the deferred payments would have amounted to \$119,548.80 if none of the assessments were paid before due, making an assessment of about \$32 an acre if paid in cash, or about \$60 an acre if paid as the installments matured.

On divers occasions during the summer of 1923, appellant consulted with Frazier with reference to the burden of said assessments and the advisability of selling said land. Frazier testified that appellant requested him to assist her in disposing of it, and that he told her he knew nothing about Florida land and was reluctant about going into it for her; that he corresponded with various real estate firms in Florida about said land, and learned nothing definite; "they would infer it was worth from \$3 to \$5 per acre." Frazier also testified that he told appellant, "I thought she ought to make every effort to dispose of it, because she had been so anxious to sell it, or should follow up

every opportunity. * * * She spoke to me about an offer of E. W. Thompson was going to give her a note for \$20,000, at 6%, running over a period of ten years, and thought she would accept it and wanted me to advise her about accepting the Thompson note. I told her I didn't think that was a good deal."

Frazier further testified that he had a talk with Thompson, and Thompson refused to give a mortgage on the land, but agreed that appellant might hold the deed; "I told her I didn't think it was a good deal, and she seemed as though she insisted on accepting this offer. * * * She kept coming to me with reference to a sale or accepting the Thompson note. She said she was going to do something about it. I again went to McDowell and talked to him and he finally said, 'if Mrs. Slemmons will give me an agreement, enter into an agreement with reference to the sale of this land, and give us an option, we will undertake to help her dispose of it,' and he told me, while he was not familiar with outside lands of that type, he did know a man in Chicago who had done such work, who was a member of the real estate board and a friend of his, and he would talk to him to see if he could get him interested in this particular land."

As a result of these negotiations, on August 3, 1923, appellant executed an exclusive agency contract to McDowell, to expire on September 5, 1923, providing for the payment of a commission of 10% on the sale price of said lands, if sale were made during the term of said contract, by McDowell or by any other person. On the same date, appellant, at the instance of McDowell, executed an option contract to appellee Brittain for the purchase of said land on or before September 5, 1923, for \$35,000.

No sale was made by McDowell and appellee Brittain did not elect to purchase under said option. Some time during the latter part of September, 1923, appellant, on the advise of Frazier, executed a contract, bearing date September 8, 1923, for the sale of said lands to appellee Brittain for \$20,000. Thereafter, on December 4, 1923, a deed was executed therefor, and in January, 1923, said transaction was consummated, and the purchase price paid. Thereafter, in January, 1925, said premises were sold to George C. Hield and Willard J. Hield, for \$241,510.

every opportunity. I + and again to be shown in 1932. I
 Thompson was going to give me a note for \$10,000, and
 over a period of two years, and I would be able to pay
 it back. I was to give him a note for \$10,000, and
 I was to give him a note for \$10,000, and I was to give him a note for \$10,000.

Thompson further testified that he had a talk with
 Thompson, and Thompson refused to give a mortgage on the land, but
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him and he finally said, 'it was. McDowell will give me an
 agreement, enter into an agreement with reference to the sale
 of this land, and give me an option, or will Thompson be able
 to give me, and he told me, 'it was a good deal, and she seemed
 with outside funds of \$10,000, and I told him I was going to
 who had done much work, who was a member of the law firm
 board and a friend of his, and he would talk to him to see if he
 could get him interested in this business deal.'

As a result of these negotiations, on August 3, 1932,
 applicant entered an option contract to McDowell, to
 expire on September 1, 1933, providing for the payment of a
 commission of 10% on the sale price of said land, to be
 were made during the term of said contract, by McDowell or by any
 other person. On the same date, applicant, at the instance of
 McDowell, executed an option contract to applicant for
 the purchase of said land on or before September 1, 1933, for
 \$25,000.

He was made of McDowell and applicant entered into an
 not also to purchase other land. From that time on
 later part of September, 1932, applicant, at the instance of
 applicant, executed a contract, bearing date of September 1, 1932, for
 the sale of said land to applicant for \$25,000. There-
 after, on December 4, 1932, applicant, at the instance of
 applicant, executed a contract, bearing date of December 4, 1932, for

\$82,110 in cash and a mortgage and notes for \$159,400 upon which interest had been paid, at the time of the hearing, of \$8,228.20. The grantees assumed the unpaid drainage assessments on the land.

Appellant seeks to have the sale of said lands to Brittain held fraudulent as to her, and prays an accounting of the profits on the sale to the Hields. It is conceded by appellees that, at the time of the execution of said contract of sale to Brittain, appellee Dime Savings & Trust Company and its officers stood in a fiduciary relation to appellant.

"Transactions between a party and one bearing a fiduciary relation to him are, upon his motion, prima facie voidable upon grounds of public policy, and the burden of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence." Thomas v. Whitney, 186 Ill. 225-321. To the same effect is Beach v. Wilton, 244 Ill. 413-424.

A confidential relation gives cause for suspicion. If a reasonable suspicion exists that confidence has been abused where reposed, the contract should be set aside. Uhlich v. Muhlke, 61 Ill. 499-510; Dowie v. Driscoll, 203 Ill. 480; Beach v. Wilton, supra, 424.

In Dowie v. Driscoll, supra, the court at page 490 says;

"The doctrine repeatedly announced by this court is that courts of equity 'scrutinize with the most jealous vigilance' transactions between parties occupying fiduciary relations towards each other (Casey v. Casey, 14 Ill. 112), and the burden of proof in such cases is on the fiduciary to establish the fairness of the transaction and that it did not proceed from undue influence. Jennings v. McConnel, 17 Ill. 148; Zeigler v. Hughes, 55 id. 288; Ward v. Armstrong, 84 id. 151; Wickiser v. Cook, 85 id. 68; Sands v. Sands, 112 Ill. 225.)"

Counsel for appellees concede the law to be as above stated, and in their brief and argument say: "We can agree that such purchase of this Slemmons land raises a presumption of fraud against defendants, and places on them the burden of negating such presumption, by proof that no fraud (deceit, misstatement or concealment) was practiced on the complainant, and that she knew and acted freely upon the truthful information furnished her.

288,110 in cash and a mortgage and notes for 115,400 upon which interest had been paid, at the time of the hearing, of 4,280.80. The grantee assumed the unpaid drainage assessments on the land.

Appellant seeks to have the sale of said lands to

Britain sold in accordance with the terms of the contract of sale, and prays an accounting of the profits on the sale to the heirs. It is conceded by appellees that, at the time of the execution of said contract of sale to Britain, appellee Bine Savings & Trust Company and its officers stood in a fiduciary relation to appellant.

"Transactions between a party and one bearing a fiduciary

relation to him are, upon his motion, prima facie voidable upon grounds of public policy, and the burden of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence." Thomas v. Whitely, 186 Ill. 235-237. To the same effect is Bess v. Wilton, 214 Ill. 413-424.

A confidential relation gives cause for rescission.

If a reasonable suspicion exists that confidence has been abused, where repudiation, the contract should be set aside. Union Nat'l Bk. of Ill. 493-510; Davis v. Braswell, 208 Ill. 480; Bess v. Wilton, supra, 214.

In Davis v. Braswell, 208 Ill. 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"The doctrine repeatedly announced by this court is

that courts of equity 'intervene with the most jealous vigilance' to protect the rights of parties in such cases as on the fiduciary to establish the fairness of the transaction and that it did not proceed from undue influence. Jennings v. McConnell, 12 Ill. 148; Taylor v. Hughes, 38 Ill. 288; Ward v. Armstrong, 84 Ill. 151; Williams v. Cook, 85 Ill. 151.

Counsel for appellees concede the law to be as above

stated, and in their brief and argument say: "We can agree that from our study of the law, we are convinced that the purchase of this St. Louis land by the appellant is a purchase of land in good faith and for value, and that the appellant is entitled to the same protection as any other purchaser of land in good faith and for value."

We might go so far as to admit the burden is on them to establish by proof beyond a reasonable doubt, or further yet, beyond suspicion, that when she acted she knew all the facts and could proceed with or refrain from going ahead with the sale." Counsel insist that they have by the evidence proved conclusively that a full disclosure of all the facts in connection with the transaction in question was made to appellant prior to the time that she executed said contract.

As evidence of good faith on the part of appellees, it is insisted that a syndicate was organized by McDowell, consisting of himself, Jobst and Brittain, to purchase said premises in order to relieve appellant of the burden of said drainage assessments, and in order that she might not suffer loss by reason of the fact that Frazier had advised her against accepting the offer of Thompson.

Shortly after the execution of the agency contract to McDowell, appellant went to Petoskey, Michigan. Counsel for appellees in their brief and argument concede that about August 15 negotiations were begun between Frazier and McDowell, looking to a sale of said lands to a syndicate to be organized by McDowell. Appellant testified that on August 17 she received the following telegram: "In case option is not closed on land would you agree to accept \$20,000 think can get cash answer. Dime Savings & Trust Co." In reply thereto, appellant wired said bank: "Prefer \$25,000. Should have \$20,000 after expenses paid but abide by your judgment. Nettie T. Slemmons."

On the same date, appellant wrote to Frazier:

"Dear Mr. Frazier:

"Your telegram was received. It is very hard to come to a decision without being able to talk things over. In case Mr. McDowell cannot get \$35,000 feel that I should have \$25,000 since I have to pay 10%. What will your charges be if I should decide to accept Mr. Thompson's offer. I feel that I must have \$20,000 after all expenses are paid but you are there and I have full confidence in you that you will do the best you can for me even though it conflicts with my decision. With kindest regards.

"Nettie T. Slemmons.

"Petoskey Aug. 17, 1923. Please pardon pencil. Keep forgetting to buy ink."

On August 27, appellee Dime Savings & Trust Company wrote

to right do as they see fit to suit the nation is on them to establish
by proper persons a reasonable basis, on whether you, persons mentioned,
that then are asked she know all the facts and could answer them
on points now being raised with the sale. I cannot insist that
they have by the evidence proved conclusively what a full disclosure
of all the facts in connection with the transaction in question was
made to appellant prior to the time that the agreement was entered.

An evidence of good faith on the part of appellant, is
it insisted that a syndicate was organized by McDowell, consisting
of himself, Johns and Webster, to purchase said lands in order
to relieve appellant of the burden of self and wife's management,
and in order that one might not suffer loss by reason of the fact
that transfer had advised her against accepting the offer of Thompson.
Shortly after the execution of the agreement, appellant was

McDowell, appellant went to Webster, Johnston, Thomas and
appellant in their brief and urgent needs that said funds

to a sale of said lands to a syndicate to be organized by McDowell.
Appellant testified that on August 14 she received the following
telegram: "In case option is not closed on land within 10 days
to accept \$20,000 within ten days or answer. John Webster, John
Co." In reply thereto, appellant wired back: "Webster \$25,000.
Should have \$20,000 either response paid but will be your judgment.
Hattie W. McDowell."

On the same date, appellant wrote to Webster:
"Dear Mr. Webster:

"Your telegram was received. It is very hard to come to
a decision without being able to talk things over. In case Mr.
McDowell cannot get \$25,000 I feel that I should have \$25,000 also I
have to pay 10%. What will your check be if I should decide to
accept Mr. Thompson's offer. I feel that I must have \$20,000 after
all expenses are paid but you are there and I have full confidence
in you that you will do the best you can for me even though it
conflicts with my decision. With kindest regards.

Hattie W. McDowell

appellant:

"Your letters at hand and have delayed answering in order to secure if possible further information with reference to the sale of your Brevard County land.

"While the 30-day option is still in effect we had an inquiry from parties interested whether or not \$20,000 cash would be an acceptable proposition to you. This was made net and the only charges that I know of to be made would be our fee and the expense of an abstract of title. * * * It looks as though it would be best to accept the \$20,000 proposition if parties are willing to go through with it."

On September 5, said Company again wrote appellant:

"Dear Madam:

"As the option which you gave on the Brevard County land expires today, we assume that parties are not going to exercise same as we have heard nothing further from them lately. Mr. Thompson came in a few days ago and stated that he understood such option had been given by you and under the circumstances he was no longer interested in the purchase of this land. After we learned Mr. Thompson's position in the matter we immediately began work on sale of land to other parties and as result of our efforts and not wishing to have you loose out entirely on the deal owing to Mr. Thompson's withdrawal, we believe that we have secured other parties who would be willing to pay you \$20,000 in cash. * * * The \$20,000 would be net to you less our charges and the expense of conveying the title, which would mean securing an abstract and placing stamps on the deed, etc. This is the best price obtainable. We tried to increase this to \$25,000, but it seemed that these parties knew of Mr. Thompson's offer and would not go any higher.

"If this is entirely satisfactory will you kindly wire us at once along the following suggestion: 'As option on the Brevard County land is not taken up you are authorized to sell the four thousand acres at \$20,000 cash.'

"We believe this is the best course to pursue under the circumstances, and as long as Mr. Thompson and Mr. Hillis are not any longer interested, would recommend closing out on this basis."

"Your letter of the 10th has been received and we have decided to withdraw the offer to sell the property at the price of \$20,000.00. We are sorry that we cannot do so, but we are sure that you will understand our position. We are sure that you will understand our position. We are sure that you will understand our position."

"While the 30-day option is still in effect we have an inquiry from parties interested whether or not \$20,000.00 is an acceptable proposition for you. This was done not and the only charges that I know of to be made would be the fee and the expense of an abstract of title. * * * It looks as though it would be best to accept the \$20,000 proposition if it is offered and willing to go through with it."

"As the option which you gave on the property, County land expires today, we cannot have parties and not being able to have parties as we have been waiting for them from today. Mr. Thompson came in a few days ago and wanted to see the property. His option had been given by you and now the title is in his name. We no longer intended to be concerned with this land. We learned Mr. Thompson's position in the matter and immediately began work on sale of land to other parties and we would not be able to make you more and not wishing to have you lose out entirely on the deal owing to Mr. Thompson's withdrawal, we believe that we have secured other parties who would be willing to pay for \$20,000.00 in cash. * * * The \$20,000.00 would be paid to you in one lump sum and the expense of conveying the title, which would mean securing an abstract and finding stamps on the deed, etc. This is the best price obtainable. We tried to increase this

"If this is entirely satisfactory will you kindly give us at once along the following suggestion: 'An option on the

property for the sum of \$20,000.00 in cash, to be paid to you in one lump sum and the expense of conveying the title, which would mean securing an abstract and finding stamps on the deed, etc. This is the best price obtainable. We tried to increase this

In reply thereto, appellant wired the bank as follows:

"Option on Breward Co. land is not taken up you are authorized to sell 4000 acres at \$20,000 cash should like to know result. Sincerely, Nettie T. Slemmons."

On September 11, the bank wrote appellant:

"We are enclosing herewith Articles of Agreement for your Florida land. The grantee's name has been left blank as the parties have not decided just how they want this deed made. We are holding the \$1000 cash payment. Kindly sign both copies and return to us at your earliest convenience."

In reply thereto, appellant wrote:

"Your articles of agreement have been received. I am not returning them until I hear from you again. I have never signed any paper that I did not understand fully. I have not been told who the buyer is, but supposed I would know when the papers were ready to be signed. You have made an explanation through Miss Carroll, but I do not feel that the paper is complete without the buyer's name, and do not feel like signing it as it is. Should like to hear from you personally on this matter as soon as possible."

On September 17, Joseph P. Durkin, secretary of appellee Dime Savings & Trust Company, wrote appellant:

"In reply to your communication of the 14th inst. to Mr. Frazier I beg to advise that the name of the purchaser to be inserted in the agreement is James K. Brittain. At the time the paper was forwarded to you he was not sure whether he wanted to take it in his name or someone else. Mr. Brittain lives in Chicago. Mr. Frazier is out of the city at the present time on his vacation and he will not return until about October 1st. The purchaser's name may be inserted in the agreement before you execute it if you so desire."

It is practically conceded by counsel for appellees that said letters and telegrams from the Dime Savings & Trust Company did not correctly inform appellant as to the negotiations being carried on for the sale of said premises. They insist, however, that when said contract was executed by appellant in the latter part of September, a full disclosure was made to her with reference to the purchasers, and all matters affecting her inter-

est in said transaction. This contention is not supported by the record.

The evidence conclusively discloses that, at the time Frazier claims the contract was signed appellee Brittain knew nothing whatever about it; had never agreed to purchase said property, and had never agreed to go into or form a part of any syndicate to purchase the same.

The record also discloses that there was a standing agreement by which the Title and Trust Company, the stock of which was owned by the Dime Savings & Trust Company, was to have an interest in the profits or commissions earned or collected by McDowell. In this case it was agreed that the Title and Trust Company was to receive 5% of the resale price. It therefore follows that the Dime Savings & Trust Company had a pecuniary interest in said transaction. This interest was not disclosed to appellant at the time she executed said contract, nor at any time up to the hearing of the evidence in this cause.

Another principle of law, vital in this case, is that "a trustee is not permitted to place himself in a position where it will be difficult for him to be honest and faithful to his trust." *Bennett v. Weber*, 323 Ill. 283-294, citing *Galbraith v. Tracy*, 155 Ill. 554; *Butler Paper Company v. Roberts*, 151 Ill. 588; *Tyler v. Sanborn*, 128 Ill. 136.

"The law does not stop to inquire into the fairness of the sale or the adequacy of the price, but stamps its disapproval upon a transaction which creates a conflict between the self interest and integrity of the trustee. (39 Cyc 366.)" *Bennett v. Weber*, supra, 204.

"The general rule is, when a trustee of any description, or a person acting as agent for others, sells a trust estate and becomes himself interested, either directly or indirectly in the purchase, the cestui que trust is entitled, as a matter of course, at his election to have the sale affirmed or set aside." *Bennett v. Weber*, supra, 294 citing *Borders v. Murphy*, 125 Ill. 577-583.

"The end or result accomplished by the trustee is not alone determinative of the rights of the parties, but the

and in this connection, the Commission is not prepared to
do so.

The evidence conclusively discloses that, as the law
stands, the Commission has no authority to do so. The
Commission is not prepared to do so. The Commission is not
prepared to do so. The Commission is not prepared to do so.

The Commission is not prepared to do so. The Commission is not
prepared to do so. The Commission is not prepared to do so.

which was owned by the same persons, the same persons, the same persons,
have an interest in the profits or commissions earned or collected
by them. In this case it has been held that the title and
control of the same are to remain in the hands of the same.

more follows that the same persons, the same persons, the same persons,
personally interested in said transaction. This interest was not
transferred to the same persons, the same persons, the same persons.

whereas the same persons, the same persons, the same persons,
that a transfer is not permitted to place himself in a position

where it will be difficult for him to be placed in a position
his trust." *Bohannon v. Weber*, 223 Ill. 111; *Bohannon v. Weber*,
California v. Tracy, 155 Ill. 984; *Bohannon v. Weber*, 155 Ill. 984;
Roberts, 151 Ill. 588; *Bohannon v. Weber*, 155 Ill. 984.

"The law does not stop to inquire into the motives
of the sale or the character of the sale, or the nature of the dis-
position, but a transaction which results in a transfer between
the same parties and interests is not permitted." *Bohannon v. Weber*, 155 Ill. 984.

Bohannon v. Weber, 155 Ill. 984.

"The general rule is, that a transfer of property
from one person to another, or from one person to another, is not permitted.

whereas and becomes himself interested, either directly or indirectly,
in the proceeds, the same persons, the same persons, the same persons,
of course, as the question is not the same. The same persons, the same persons,
same persons, the same persons, the same persons, the same persons,
155 Ill. 984.

trustee's method of executing the trust free from his individual interest is of the essence of the trust." *Bennett v. Weber*, supra, 294.

In *United States v. Carter*, 217 U. S. 286, the court at page 309 says:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal; and at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not in such case impose upon the principal the burden of proving that he was in fact injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act in the matter of the agency solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal."

In *Perry v. Engel*, 296 Ill. 549, the court at page 554 says:

"The rule is, that if a party employs another as his agent to sell his real estate or exchange it for other real estate, he is entitled to all the agent's skill, ability and industry in making the sale or exchange on the best terms that can be had, and is entitled to the property, in case of an exchange, at the price the agent paid for the same. An agent cannot take any advantage of his position to speculate to the injury of his principal, and all profits and advantages gained in the transaction belong to the principal. The relation of principal and agent is one of trust and confidence, and where such confidence is reposed and such relation exists, it must be faithfully acted upon and preserved from any intermixture of imposition."

The record in this case clearly discloses that the Dime Savings & Trust Company and its officers, the Title and Trust Company and its officers, had permitted themselves to occupy a position in which their pecuniary interests, under the authorities above cited, made it difficult for them to be honest.

In addition to the facts above set forth with reference to the interest of the Dime Savings & Trust Company in said transaction, the record discloses that said ~~insitutu~~ institution had an interest in having appellant reject the Thompson offer. Had that offer been accepted appellee Dime Savings & Trust Company would not have been entitled to compensation of the sale of said premises; and McDowell and Jobst, stockholders and officers in said Title and Trust Company, would not have had the opportunity of going into a speculation which the evidence shows they were anxious to go into, and which they believed would result in a profit to them and to said trust company. Then, too, if a sale of said premises were made through the Dime Savings & Trust Company, the proceeds thereof when not invested, would naturally be deposited in said bank.

Counsel for appellees seek to place their clients in the position of benefactors of appellant, it being their contention that said syndicate was formed by McDowell after Thompson had withdrawn his offer, and that the officers of the Dime Savings & Trust Company felt that they might be subject to criticism in having advised Mrs. Slemmons not to accept Thompson's offer. The only person who testified that Thompson had withdrawn his offer was Frazier. Several telegrams and letters had passed before the information was communicated to appellant that Thompson had withdrawn his offer. An examination of the correspondence and the testimony of the various witnesses in connection therewith discloses that, prior to the withdrawal of Thompson's offer, Frazier and McDowell were actively negotiating for a sale of said premises to said syndicate. McDowell was anxious to take over said lands. Appellee Brittain testified: "McDowell told me nothing about the land except that he wanted to buy it. At the first conversation, he told me he hoped to get Jobst in, and the last time he said he had interest Mr. Jobst. * * * He seemed anxious to make the deal.

He wanted to go into the deal and wanted me to go in." It should also be observed that McDowell testified he was advised by Frazier that the assessments against said land were only \$60,000, and that he afterward learned that said assessment was \$240,000. Notwithstanding his misunderstanding with reference to the amount of said assessments he went on and completed said purchase in January 1924, thereby evidencing that appellees were buying said premises for resale at a profit, and not as an accomodation to appellant.

It is also insisted that appellant, by executing a deed to the grantees of Brittain, confirmed said transaction and is now estopped to question the same. While the master found with appellees, that said deed amounted to a confirmation of the transaction appellant had with appellees, the court on the hearing sustained the exception of appellant thereto. As no cross errors were assigned by appellees on the ruling of the court thereon, they are not in a position to insist that ^{appellant is} ~~appellant is~~ estopped by the making of said deed. It might be further observed that the evidence discloses that, at the time said deed was executed, appellant was sick in bed. She testified that she did not understand the purport of said deed. The testimony of Mr. McGrath is to the effect that Millis, who obtained said deed from appellant, stated in effect that she may not have understood that it had to do with the Brevard county lands. However that may be, appellant had not been advised of the interest of the Dime Savings & Trust Company and its officers in said transaction and in the commission to be derived therefrom. She would therefore not be estopped by said deed.

It is also insisted by appellees that appellant was speculating on her rights, had been guilty of laches and was therefore not entitled to maintain her bill.

"A court of equity applies the doctrine of laches in denial of the relief prayed, where the statutory period has not expired, only where, from all the circumstances in evidence, to grant the relief to which the complainant would otherwise be entitled would presumptively be inequitable and unjust because of the delay, to the defendants." Dixmoor Golf Club v. Evans, 325 Ill. 612-622, citing Stiger v. Bent, 111 Ill. 328. To the same effect is Grant v. Springer, 330 Ill. 280-293; Schultz v. O'Hearn,

It is also noted that the assessment against said land was only \$50.00, and that also be observed that although testified to and received by the State.

ing his administration with reference to the amount of said assessments he sent on and collected said amount in January 1934, thereby evidencing that appelles were paying said amount for

It is also noted that appellant, by executing a deed

to the trustees of University, confirmed said transaction and is now

that said deed amounted to a confirmation of the transaction

appellant had with appellees, the amount on the books showing

by appellees on the writing of the county records, which was not

also that, at the time said deed was executed, appellant

was sick in bed. She testified that she did not understand the

purpose of said deed. The testimony of Mr. Johnson is to the

effect that Willie, who obtained said deed from appellant,

stated in effect that she may not have understood what it was to

do with the Nevada county lands. However, she was

had not been advised of the interest of the State in said

Company and its officers in said transaction and in the confirmation

to be derived therefrom. The would therefore not be satisfied by

It is also noted by appellees that appellant was

speculating on her rights, had been guilty of fraud and was

"A court of equity applies the doctrine of fraud

in denial of the relief prayed, where the statement would not

be made, and the statement is made with intent to defraud

the party to whom the statement is made, and the statement is

319 Ill. 244-248.

Counsel for appellees in their brief and argument admit that, from the death of Judge Slemmons, in 1918, until April, 1921, that the Dime Savings & Trust Company acted as administrator de bonis non of his estate; that "C. W. Frazier was the representative of the Dime Savings & Trust Company during such period of administration, and as such did the Slemmons business, and afterwards, down to the fall of 1926, made other land sales and collections for Mrs. Slemmons." Frazier continued to be the confidential adviser of Mrs. Slemmons until shortly prior to the filing of the bill herein.

Failure to use diligence to discover fraud is excused where a relation of trust and confidence exists between the parties to the transaction. *Vigus v. O'Rannon*, 118 Ill. 334-346; *Letyens v. Ahlrich*, 308 Ill. 11-21; *Gillett v. Wiley*, 126 Ill. 310-328.

Under the evidence in the record, appellees are not in a position to urge as a defense to said bill that appellant was guilty of laches.

Counsel for appellees lay great stress on the fact that appellant contradicted herself frequently while testifying, and apparently insist that, by reason thereof, she was not entitled to relief. The record does not disclose, and it is not contended by appellees, that appellant was guilty of any fraud in connection with said transaction. On this record it is not so much a question whether the equities of the case appeal so strongly in favor of appellant, as whether the facts and circumstances disclosed by the record are such that, as a matter of public policy, appellees should be held to an accounting for the profits derived by them on the resale of said premises, for the reason that, occupying a fiduciary relation, they failed to disclose fully to appellant all the facts and circumstances known to them at the time of said transaction, and had suffered themselves, in said transaction to occupy a position where, under the law, it is held that it would be difficult for them to be honest. Our holding is that they did not so disclose such facts and circumstances to appellant, and that they did in fact allow themselves to be placed in a position where, under the law as laid down in the foregoing authorities, it

219 Ill. 244-246.

Counsel for appellees in their brief and argument admit that, from the death of Judge Simmons, in 1916, until April, 1921, and the time Savings & Trust Company acted as administrator of the estate; that "O. W. Trexler was the representative of the time Savings & Trust Company during said period of administration, and as such did the necessary business, and after wards, down to the fall of 1926, made other loans and collections for Mrs. Simmons." Trexler continued to be the confidential adviser of Mrs. Simmons until shortly prior to the filing of this bill herein.

Failure to use diligence to discover fraud is avoided

where a relation of trust and confidence exists between the parties to the transaction. *Wynn v. O'Connell*, 112 Ill. 2d 346; *Levy v. Aronson*, 208 Ill. 11-21; *Gillett v. Wiley*, 192 Ill. 244-246.

Under the evidence in the record appellees are not in

a position to say that the record is not in dispute.

Counsel for appellees lay great stress on the fact that appellant contradicted herself frequently while testifying, apparently insinuating that, by reason thereof, she was not entitled to relief. The record does not disclose, and it is not contended by appellees, that appellant was guilty of any fraud in connection with said transaction. On this record it is not so much a question whether the equities of the case appeal so strongly in favor of appellant, as whether the facts and circumstances disclosed by the record are such that, as a matter of public policy, appellees should be held to an accounting for the profits derived by them on the basis of said premises, for the reason that, regardless of the relation, they failed to disclose fully to appellant all the facts and circumstances known to them at the time of said transaction, and had suffered themselves, in said transaction to be misled by the facts and circumstances known to them at the time they entered into the same. Our holding is that they are entitled to relief and a judgment in their favor.

would be difficult for them to be honest.

Counsel for appellees also contend as a matter material to the determination of this cause that the title to the premises in question came to appellant by deed from her husband, and not by devise. Inasmuch as the fiduciary relationship of the parties is conceded, we do not deem it a matter of importance how appellant derived her title.

Some question is sought to be made by appellant that she only agreed to convey 4,000 acres of said lands and that 4,110 acres were in fact conveyed. Appellant is not attempting to rescind said sale, but is suing for an accounting ~~for~~ of the proceeds of the resale, which included the entire tract. This would therefore render this question of minor importance.

While the record discloses that appellee Brittain had no active connection with the transaction in question until after appellant had executed the contract of September 8, it is not contended by appellees in their written brief and argument that Brittain stands in any different light than the other of appellees, in connection with the issues involved. On the oral argument it was stated in open court by counsel for appellee Brittain that they were not insisting that he was entitled to any other or different consideration than that given to the other of appellees. It is therefore not necessary for us to discuss this feature.

As said cause must be reversed and remanded for an accounting, it is proper that we should indicate the basis of the accounting.

All profits and advantages gained by an agent as the result of his breach of duty to his principal belong to his principal, and he will be required to account to the principal for such profits. *Perry v. Engle*, 296 Ill. 549-557; *Dixmoor Golf Club v. Evans*, 325 Ill. 612-623.

Commissions paid to an agent who has ^{caused} the trust reposed in him should be accounted for by such agent to his principal. *Perry v. Engle*, supra, 549-557; *Bunn v. Kesch*, 214 Ill. 259-264.

When a transaction is held to be fraudulent on account of a fiduciary relationship, the decree should credit the agent with any cash payment made at the time of the transaction, but he is not entitled to interest on such payment. *Feeney v. Runyan*, 316 Ill. 246-252.

We therefore hold appellees should be held to account for the cash proceeds received by them on the sale of said premises, together with all payments on the principal, if any, and all interest collected by them subsequent to said cash payment, and this to include the commission paid by appellant to the Dime Savings & Trust Company, but not to include the commissions allowed George C. Hield, inasmuch as it amounted in effect to a deduction from the purchase price for said premises, and in equity appellees should not be required to account therefor. Appellees should also be required to indorse to appellant, without recourse, the notes remaining unpaid on said sale price, together with the mortgage securing the same. Appellees should be credited with the amount paid to appellant on the purchase of said premises; with the taxes and assessments paid by them on said premises; with all abstract fees paid by them, and all necessary attorneys' fees paid by them in connection with the sale of said premises and the perfecting of the title thereto, including recording fees, revenue stamps, etc. We also hold that appellees should be entitled to the expenses of Brittain in connection with the examination of said lands.

For the reasons above set forth, the decree of the trial court will be reversed and the cause remanded, for further proceedings in keeping with our opinion and direction herein.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

6108 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25-13-321³

BE IT REMEMBERED, that afterwards, to-wit: On

24 1929 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

February Term, 1929.

Joseph A. Jadrich,

appellee,

vs.

Maude R. Reinhardt,

appellant,

Appeal from the Circuit Court
of Lake County.

JETT, J.

This is an appeal brought to review a judgment for \$4,419.96, obtained in the circuit court of Lake County, in an action of assumpsit, by Joseph A. Jadrich, appellee, against Maude R. Reinhardt, appellant. For the purpose of this opinion, appellee will be referred to as plaintiff, and appellant, as defendant.

The declaration consists of the common counts, accompanied by an affidavit of merits, in which the plaintiff stated "the demand of the plaintiff in the above entitled cause is for cash monies advanced for, and on behalf of, the defendant, and to services rendered for the defendant at her request, and for expenses incurred for the use of the defendant, and that there is due to the plaintiff from the defendant, after allowing to her all just credits, deductions and set-offs, the sum of \$4,522.96".

To the declaration the defendant pleaded the general issue, and filed an affidavit of defense, in which it is stated that she has a good defense to the entire claim of the plaintiff with the exception of \$13.13 on cash account, and a reasonable fee for services rendered by the plaintiff as a lawyer, in obtaining sale of forfeited taxes on property owned by the defendant, not to exceed \$100.00.

The evidence on the part of the plaintiff is to the effect that he had known the defendant since the early part of the year 1923; that during the months of May, June, July and August, 1925, she occupied desk room in his office; that in October or November, 1924, the defendant called on the plaintiff and asked "whether I could handle her property at North Chicago towards clearing up

Joseph A. Tardiff,

appellee,

vs.

appellee.

This is an appeal brought to review a judgment of the Circuit Court of the County of Cook, Illinois, in Case No. 10,000, obtained in the Circuit Court of Cook County, Illinois, in Case No. 10,000, by Joseph A. Tardiff, appellee, against Reinhardt, appellant. For the purpose of this opinion, appellee will be referred to as plaintiff, and appellant, as defendant. The decision consists of the seven counts, summarized by an affidavit of merits, in which the plaintiff avers "the demand of the plaintiff in the above entitled case is for cash monies advanced for, and on behalf of, the defendant, and for services rendered for the defendant and his property, and for expenses incurred for the use of the defendant, and that there is due to the plaintiff from the defendant, after allowing to her all just credits, deductions and set-offs, the sum of \$100.00."

To the decision the defendant filed the general issue, and filed an affidavit of defense, in which it is stated that she has a good defense to the entire claim of the plaintiff with the exception of \$15.15 on cash account, and a reasonable fee for services rendered by the plaintiff as a lawyer, in obtaining sale of forfeited taxes on property owned by the defendant, not to exceed \$100.00. The evidence on the part of the plaintiff is to the effect that he had known the defendant since the early part of the year 1928; that during the months of May, June, July and August, 1928, she occupied desk room in his office; that in October of November, 1928, the defendant called on the plaintiff and asked "whether I could handle her property."

the taxes." She asked me if I was in a position to do so, and I told her I was at that time. Then we discussed as to what my fees would be, and I told her I usually got one-third, on a contingent basis. She told me that was what she was paying her lawyer in Chicago, and that would be satisfactory to her, but we made no agreement at that time.

The next time we talked on this subject, was on November 28, 1924. At that time she came to my office and I told her I could not take the case unless I had some authority to represent her, and with that, I told her I wanted a retainer. She asked if \$50.00 would be enough to retain me; I said 'yes', and she made out a check for \$50.00 and told me to go ahead and proceed with the work in accordance with the conversation we had, that is, to receive one third of what I saved her on her taxes and special assessments.

The evidence of both plaintiff and defendant is that the defendant had purchased certain properties which were involved with tax liens and special assessments. The aggregate involved amounted to \$18,000.00 or \$20,000.00.

The testimony of the plaintiff is that through his efforts, and the efforts of counsel employed by him, he procured the settlement of \$17,861.43 in taxes and special assessments for \$7,452.81. He further testified that the defendant continued to have him attend to her business, and sent a special assessment notice on other property, for his attention; that he was successful in that, and for that work, charged the defendant \$700.00, which he testified to as being a reasonable and usual fee for the work. This latter item, being a separate matter from the special assessments and taxes previously mentioned.

The plaintiff was corroborated with reference to his employment. Dorothy Dahl, a witness for the plaintiff, testified that she worked for him, beginning in 1923, and ending in July, 1926; that she first met the defendant in plaintiff's office in 1924; that her best recollection was that the defendant was in plaintiff's office some thirty to forty times; that in November, 1924, she heard a conversation between plaintiff and defendant, in

...made no agreement at that time.

The testimony of the plaintiff is that he was employed by the defendant from 1917 to 1921, and during that time he was employed as a clerk in the office of the defendant. He further testified that the defendant's books and records were not kept in accordance with the law, and that he was not paid for his services. He further testified that the defendant's books and records were not kept in accordance with the law, and that he was not paid for his services. He further testified that the defendant's books and records were not kept in accordance with the law, and that he was not paid for his services.

[illegible]

which defendant asked the plaintiff "If he could clean up her general taxes and special assessments on her property in North Chicago and Mr. Jadrich asked for one-third of the amount saved on her general taxes and special assessments, and Mrs. Reinhardt said to go ahead, that was al-right".

Dorothy Dahl further testified that she had charge of the bookkeeping for plaintiff, and that she sent statements to the defendant on several different occasions, for the amount owing by defendant, being somewhere around \$4500.00.

Furthermore, in addition to the testimony of the witness Dahl, the plaintiff is corroborated by certain letters offered in evidence, written by the defendant to the plaintiff, which indicate that the plaintiff was acting as her attorney and that she was requiring of him diligence in connection therewith.

The defendant testified in her behalf that the payment of \$50.00 to the plaintiff was a loan to him and not a retainer fee; that the first time she met the plaintiff, he wanted to know "If I would sell him the property that he had tried to buy from Mr. Marhoeffer, but I beat him to it? He asked me what I was going to do with the property and I told him I was going to build it up. He told me that if I wouldn't sell him the property, he would like to list and sell it for me. He further stated 'My charges are the same as in Chicago, 3% on improved and 5% on vacant.' I said 'What do you services cover?' he said 'Everything from the beginning to the close of the deal.' I said 'Fine', he said 'You know there are large forfeited assessments against your property?' I said 'Yes, Mr. Marhoeffer told me.' He said 'What are you going to do about them?' I said 'Pay them, Mr. Marhoeffer agreed to buy them for me for \$3000.00".

The defendant further testified that Mr. Jadrich requested that she bring him some brick to the office so as to make better sales and give prospects a choice of better plans and bricks.

In other words, the defendant testified that her transactions were, for the most part business transactions, had with the plaintiff, and that he was not, except in one or two instances, acting as her attorney. Her testimony in substance, being that she

...which defendant offered to ...
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...bookkeeping for plaintiff, and ...
...defendant on several different occasions, for the amount of ...
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...Furthermore, in addition to the testimony of ...
...the plaintiff is corroborated by certain letters ...
...written by the defendant to the plaintiff, which indicate ...
...that the plaintiff was acting as her attorney and that she ...
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...The defendant testified in her behalf that the payment of ...
...\$500.00 to the plaintiff was a loan to him and not a ...
...that the first time she met the plaintiff, he wanted to know ...
...I would sell him the property that he had asked to buy from ...
...Manchester, but I told him to let me ask him what I was ...
...to do with the property and I told him I was going to build it ...
...up. He told me that if I wouldn't sell him the property, he ...
...like to live and sell it for me. He further stated 'I'm coming ...
...and the same as in Chicago, I'm on improved and ...
...I said 'What do you want to do?' he said 'I want to ...
...beginning to the close of the deal.' I said 'What do you ...
...You know there are large forfeited assessments ...
...property?' I said 'Yes, Mr. Manchester told me.' He said ...
...and you going to do about them?' I said 'Yes, then, Mr. Manchester ...
...agreed to pay them for me for \$2000.00'.
...the defendant ...
...that she ...
...called and ...
...in other words, the defendant testified that the ...
...wife, for the ...
...left, and that he was ...
...as her attorney. The testimony is ...

was dealing with the plaintiff as a real estate agent rather than as a lawyer.

After examination of the record we are of the opinion that the finding of the jury, in favor of the plaintiff, is supported by the weight of the evidence and that the plaintiff had been employed by the defendant as her attorney and was to be paid one-third of the amount he would save her on her tax liens and special assessments.

The defendant insists that the court erred in permitting the plaintiff to offer evidence that he had employed another attorney to assist him, for the reason that he would have no right so to do. The plaintiff testified in this connection that no charge was being made for the services of this attorney. In so far as the record discloses, the plaintiff employed the attorney, simply as an assistant to himself in carrying out his employment with the defendant.

The defendant further insists that the court erred in permitting plaintiff to offer proof bearing upon the usual and customary attorney's fee. According to the theory of the plaintiff, and on which he tried the case, it was not necessary to offer proof with reference to attorney's fees, except as to the transactions which he claims was not connected with the original employment, so far as that employment was concerned. There was no serious error in the ruling of the court on this evidence.

The defendant urges that the court erred in its ruling on the instructions. We have examined the instructions and the suggestions made, relative thereto, by the defendant, and we are of the opinion that there is no real merit in this contention of the defendant.

No serious objection is pointed out as to any of the instructions given on behalf of the plaintiff, and the record shows that the court gave a large number of instructions on the part of the defendant, which instructions fully presented the defendant's theory of the case, so far as applicable to the issues in the cause.

new edition of the book entitled "The Law of Evidence" published in 1908.

The defendant insists that the court erred in admitting the evidence.

By the weight of the evidence and the fact that the defendant was employed by the plaintiff as a helper and that the plaintiff was the owner of the business he would have been on his feet for some time.

The defendant insists that the court erred in admitting the evidence to other evidence that he had employed another person to assist him, for the reason that he would have been on his feet for some time. The plaintiff testified in this connection that he had employed the defendant for the services of this attorney. It is also the record disclosed, the plaintiff employed the defendant simply as an assistant to himself in connection with the business.

The defendant insists that the court erred in admitting the evidence to other proof bearing on the issue of the plaintiff's attorney's fee. According to the record in this case, and on which he based his case, it was found that the plaintiff was not entitled to attorney's fees, and that the defendant was entitled to attorney's fees. The court found that the plaintiff was not entitled to attorney's fees, and that the defendant was entitled to attorney's fees.

The defendant urges that the court erred in admitting the evidence. We have examined the instruction and the evidence, and we are of the opinion that there is no real merit in this contention of the defendant.

No serious objection is pointed out as to any of the instructions given in this case. The instructions, and the record, show that the court gave a large number of instructions to the jury. The defendant, when instructions fully presented the defendant's case, so far as applicable to the facts in the case.

In passing it might be well to say that no proof was offered by the defendant, tending to show that the attorney's fee charged, were not the usual, reasonable and customary fees charged by members of the bar in Lake County.

It is next urged that the record discloses that the plaintiff was occupying a dual position, in that he had been acting as attorney for the village or city of North Chicago, where said premises were located,^{and} that his employment as such city attorney, made his interests adverse to those of the defendant. The employment of plaintiff as city attorney for North Chicago, according to the record, ended in the spring of 1923.

While a resolution was passed by the village council for the employment of the plaintiff, in connection with certain taxes, there was no evidence to the effect that he had acted in any way in connection with the taxes and assessments herein involved; his testimony being that he severed all connection with said village in August, 1924; that he had expended certain monies on behalf of said village amounting to over \$1400.00 for which he brought suit and recovered against said village, but that said sum was made up of monies paid out by him for the use of said village and not for attorneys fees in representing said village in reference to these taxes. No attempt was made thereafter to rebut this testimony or to connect the plaintiff up as a representative of the village in connection with the assessments and taxes herein involved.

We are of the opinion that the judgment of the Circuit Court of Lake County should be affirmed, which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

353 1A. 621⁴

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 24 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

PAVER CANNERIES, INC. :
 Appellant :
 :
 vs. :
 :
 DAVID L. MARTIN? :
 Appellee :

APPEAL FROM THE COUNTY COURT
 OF WHITESIDE COUNTY.

MAY TERM, A. D. 1929.

Jett, J.

This suit was instituted in the County Court of Whiteside County, by the Paver Canneries, Inc. appellant, against David L. Martin, appellee, to try the title to property levied upon by the sheriff of said county, by virtue of an execution issued out of the office of the clerk of the circuit court of Whiteside County, in favor of appellee and against the J. M. Paver Company, a corporation.

There were no pleadings in the case and no propositions of law submitted, but there was notice, as required by the statute, as laying the foundation to try the rights of property. The county court found the property not to be in the appellant, and entered judgment that the appellee recover his costs and that the sheriff proceed with the levy and make the sale under the execution, in favor of the judgment in favor of appellee. From the order of the county court this appeal was prosecuted to this court.

The record discloses that the J. M. Paver Company was an Indiana corporation, and had a cannery at Sterling, Illinois. In connection with its business at Sterling, it had rented two farms from David L. Martin, the appellee; one of the farms being owned by Martin individually, and the other by him as trustee.

The record further discloses that the J. M. Paver Company had, on the farms, farm machinery and live stock, which were employed and used in the operation of said farms in connection with its said business.

The corporation became involved in financial difficulties and a meeting of its creditors was held in Chicago, at the Sherman Hotel, on April 18, 1928. This meeting was attended by appellee.

Martin, The evidence shows that appellee knew that a committee was appointed to devise ways and means to protect the creditors of the J. M. Paver Company, and at the same time manage and operate its plant and property.

As a result of the meeting it was planned to form a new corporation, to be known as the Paver Canneries Inc. The new company was to issue one thousand shares of stock of no par value; nine hundred and ninety shares thereof to be paid to the J. M. Paver Company, in consideration of a transfer to the Canneries Company, of all its property of every kind and character, including tangible and intangible. The other ten shares were issued to certain named incorporators of the Paver Canneries Inc. On April 20, 1928, three members of the committee signed the preliminary incorporation articles and sent them to the office of the Secretary of State at Springfield, where they were received the next day.

Articles of incorporation were issued, and on April 21, 1928, the Creditors Committee sent out notices by registered mail in compliance with the Bulk Sales Law of Illinois, to all creditors, including appellee Martin, who admitted on the trial that he received such notice. Accompanying said notices was a letter by the attorneys for the Creditors Committee, giving full and complete explanation of the proposed plan of taking over the J. M. Paver Company, and the purposes of the organization. Notices were sent out stating that the property of the J. M. Paver Company was to be transferred to the Paver Canneries Inc., on May 1st, following. There was no concealment of any fact from appellee or from any other creditor. Appellee obtained full information as to what was being done with the property of the J. M. Paver Company; he made no objection, entered no protest and apparently acquiesced in all that was done, until on or about August 31, 1928, when he had issued out of the office of the clerk of the circuit court of Whiteside County, an execution on a judgment obtained that day by him by confession against the J. M. Paver Company. Appellee thereupon caused the execution to be levied upon the equipment and property which was upon the farms leased to the J. M. Paver Company. On the

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...J. M. Haven Company; he made no objection, entered no...
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...against the J. M. Haven Company. The...
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...as upon the terms...
...on the

date set for the sale of such property, notice of the rights of trial of property was given, and the trial resulted in favor of appellee, as heretofore stated.

A review of the evidence shows but few of the material facts to be in dispute and it is not at all disputed that the goods and chattles involved in this proceeding were the property of the J. M. Paver Company, and were transferred and sold by it, prior to the date of the judgment and levy of appellee, in fact, by some four and one-half months. The only theory upon which the appellant cannot be entitled to the property levied upon, is that the transfer by the J. M. Paver Company was tainted with fraud or that there was a failure to comply with the Bulk Sales Law.

A Creditor's Committee endeavored to protect the creditors of the J. M. Paver Company, realizing that it was necessary to comply with the Bulk Sales Law. When it was determined that the instrumentality of a newly organized and independent corporation was essential, it was necessary that until it's organization was perfected, there would have to be some agency because of the pressing situation. On April 20, 1928, the Creditor's Committee obtained from the J. M. Paver Company a sworn list of creditors, the affidavit being that of Paul W. Paver, president of said company.

The day on which the sworn list of creditors of the J.M. Paver Company were received, the committee, as incorporators, as the evidence discloses, made application for the issuance of a charter to the appellant, Paver Canneries, Inc., the members of the committee composed the first board of directors. While they were waiting to receive the charter, the committee in Chicago were sending out by registered mail to the creditors including appellee, the Bulk Sales notices signed by them.

The evidence discloses that the Creditor's Committee had already entered into an agreement in writing with the J.M. Paver Company whereby said company agreed to sell and transfer to the committee, naming all it's personal property and the committee agreed to deliver to the J. M. Paver Company 990 shares of no par value stock in a corporation about to be organized with a capital of 1000 shares of no par value stock and a bill of sale to be executed when the stock would be

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delivered. After notices had been sent to appellee and to the other creditors, ten days in advance of the actual consummation of the transfer, the first meeting of the appellant's board of directors was held, they being also the members of the Creditor's Committee.

As directors they, by a resolution formerly adopted and accepted the proposition made by them as members of the committee to the appellant, whereby if appellant would issue 990 shares of its no par value stock to the J. M. Paver Company in performance of their agreement as members of the committee, incorporators, and subscribers, they would cause ~~the~~ the J. M. Paver Company to execute a bill of sale directly to the appellant. The acquisition of the property being consonant with the proposition of the appellant's incorporation and for its benefit the agreement was executed.

The Creditor's Committee in performance of their agreement with the appellant, had the J. M. Paver Company execute a bill of sale directly to the appellant, Paver Canneries Inc. Does the fact that the Bulk Sales notices were signed by the members of the Creditor's Committee and the bill of sale under the circumstances made and executed directly to the appellant, render the transfer void under the Bulk Sales Law?

The transactions were consummated in fact by the same persons as were parties to the original contract. The committee, instead of having the bill of sale executed to them and then in turn executing a bill of sale to the appellant, had the bill of sale executed directly to appellant.

We are unable to understand how there would be any impropriety by virtue of such procedure because the appellee and all parties interested were fully advised that a new corporation was to be formed as a measure for protecting new advancements and the credit that would be required, and in the Bulk Sales notice, were specifically told that the consideration would be 990 shares of no par value stock in the Paver Canneries Inc.

The sale was being made to the creditor's Committee as such, and the transfer to them.

The J. M. Paver Company simply treated the property as that of the committee at the direction of the committee,

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...and accepted the proposition ...
...to the appellant, whereby it ...
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executed the form of bill of sale to the appellant directly. It must be kept in mind that a contract of sale had been executed a sworn statement of creditors obtained from the vendor, J. M. Paver Company and notices sent out by registered mail by the committee.

In fact, the notice which fully disclosed the terms of the sale and date and consideration was actually received by appellee eight-days in advance of the date set for the consummation of the sale. The purpose of the Bulk Sales Law is to afford to creditors an opportunity of taking such steps with reference to the stock of goods as they may desire in order to protect themselves.

Block vs. Brackett 214 Ill. App. 488-491.

In view of the state of the record, we are not prepared to say that there was not such a compliance with the Bulk Sales Law as to make the transaction void.

Furthermore, even if the sale had not been made in compliance with the Bulk Sales Law, the appellee would under the circumstances be estopped to deny the validity of the transfer. After receiving the notice and the letter of the Committee, and with full knowledge of the circumstances and having attended the meeting of creditors, he did nothing for a period of four months or more. After the lapse of four months and after the appellant issued it's 990 shares of no par value stock, appellee seeks to invalidate the transfer of the property in question upon the ground that the Bulk Sales notice had only been signed by the Committee. Assuming the notice to have been insufficient and not in compliance with the statute, yet there was such an attempt made to comply as estops appellee by virtue of his failure to act when he was under a duty to act.

In Block vs Brackett Supra, the court held that under the Bulk Sales Law the sale is suspended for the five-day period to permit creditors to act in behalf of their interest. We think it is too late for appellee after the action had been taken, as the record discloses had been done in good faith, and in reliance upon his inaction, and apparent acquiescence after at least an attempt to comply with the Bulk Sales Law to say the notice was insufficient in some detail that it was only signed by

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1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the solution. Once the problem has been solved, the final step is to evaluate the results and determine if the solution was effective. This involves comparing the results of the solution to the original problem and determining if the problem has been resolved.

the committee. The burden is upon appellee if he charges there was fraud in the transfer by the J.M. Paver Company to establish the fraud by clear and convincing proof.

In Union National Bank vs State National Bank 168 Ill. 2d 256, the Court said: "Fraud will not be presumed but must be proved by the party alleging it, by clear and convincing evidence."

Every step taken and every act done is consistent with fair dealing and for the benefit of all the creditors of the J. M. Paver Company in order to preserve all the assets possible to realize as much as possible for the unsecured creditors.

It will be readily seen from an examination of the record that the transaction in question is not tainted with the slightest fraud. We find that a meeting of creditors had been held in Chicago and at this meeting which appellee attended, the committee was appointed.

Within two days of it's appointment, the committee determined that two of the J. M. Paver Company's plants could still be operated advantageously and it is not unfair to assume that this was necessary in order to salvage the assets and liquidate them, and for that purpose additional credits were required, and of course, could not be obtained without some security for the repayment of the advancements.

It is argued by appellee that there was no delivery of the property of the J. M. Paver Company to the Paver Canneries Company. No change of location in the property was had but appellee had notice that on May 1, 1928, a change of ownership in the property would occur. This not only included the farm implements and live stock but also the leases to the farms.

Where a creditor has notice of the sale, then, even if there is no change of possession between the vendor and vendee, the creditor's levy will be subject to the sale.

In Sechler Carriage Company vs. Dryden 71 Ill. App. 583, it was held that where a creditor levied upon chattles in the possession of his debtor, the creditor having been notified of the sale by the vendor it was held the vendee could maintain a suit in replevin for the chattles.

In view of all of the facts as disclosed in this

the committee. The question is whether it is a proper thing
was made in the statement by the L. A. River Company to the
the board of directors and controlling group.

In the National Western State Bank, 1911, 1912,
at 250, the Court said: "There will not be a transfer of the
and by the party claiming it, by itself and exclusively, and
every day when and every day it is made."

fair dealing and for the benefit of all the creditors of the
River Company in order to preserve all the assets
realize as much as possible for the common good of all.

It will be readily seen that an examination of
record that the transaction in question is not a sale of the
slightest kind. It is a sale of an interest, not a sale
held in Chicago and the sale of the stock of the company, and
committee was equal.

Within two days of the agreement, the committee
determined that two of the L. A. River Company's assets, which
still be operated and managed, and it is not a sale of the
that this was necessary in order to preserve the assets of the
them, and that the company's assets, which are the stock, and
of course, could not be obtained without the consent of the
repayment of the advances.

It is argued by appellees that there was no delivery
of the property of the L. A. River Company to the bank, and
Company. No change of location in the property was made, but
appellees had notice that on May 1, 1924, a change of ownership
in the property would occur. This was only known to the bank
appellees and the stock but also the names of the names.
There is a creditor has notice of the sale, then, even

in there is no change of possession between the vendor and
vendor, the creditor will be subject to the sale.
In *Central Bank v. Lumber Co.*, 1911, 1912, the
SAC, it was held that where a creditor levied upon a debtor
the possession of the debtor, the creditor's lien was not
of the sale by the vendor, it was held that the vendor could not
a sale in relation to the sale.

In view of all of the facts as stated in this

record, we are of the opinion that appellee is not in a position to contend that there was no delivery such as would effect him.

We conclude therefore, that the county court of Whiteside County should have found the right of property in appellant and the judgment of said court is reversed and the cause is remanded with directions to the court to set aside judgment heretofore entered and enter judgment in accordance with the findings herein.

Reversed and Remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

6322 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 L.A. 621 5

BE IT REMEMBERED, that afterwards, to-wit: On
1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Jacob Engelkens,

appellant,

vs.

Katie Engelkens,

appellee,

Appeal from the Circuit Court
of Whiteside County.

May Term, 1929.

JETT, J.

Jacob Engelkens, appellant, filed a bill for divorce in the circuit court of Whiteside County, in which he charged Katie Engelkens, appellee, with desertion. Appellee answered the bill denying the charge of desertion, and filed a petition for alimony and solicitor's fees. The cause was heard by the Chancellor, who entered a decree, denying a divorce and allowing appellee a solicitor's fee of \$75.00. Appellant prosecuted this appeal. Appellant hereinafter will be called complainant, and appellee, defendant.

It is the contention of the complainant that the court erred in denying him a divorce, and in rendering judgment against him for costs of suit and for solicitor's fees; also that the court erred in refusing to confirm and ratify the property settlement, made between the complainant and the defendant.

The complainant, in his bill, set up the property settlement, in which the property owned by him was divided between them; the defendant received at least one half of the property owned by the complainant at the time of the property settlement, and of the value of about \$6,000.00.

The Statute provides that divorce may be granted when either the husband or the wife has wilfully deserted and absented himself or herself from the other, without any reasonable cause, for the space of two years. The record discloses that the parties to this proceeding lived together as man and wife and got along fairly well until 1924 and 1925. During the year 1925, serious trouble arose between them, and continued until May 13th 1926. They have not lived together as man and wife since May 13th, 1926.

1900-1901

conclusion

...the ...

2004-2005

1881, 1905, 1934

1990

00.240: To get a notation

References

.00,000.20 tons to value

for this proceeding⁵ lived together on same

The defendant accused the complainant of running around, associating and being intimate with other women. She drove him from her bed, and he was obliged to and did take up his abode in the barn for a number of months. She charged him with being intimate with other women, but failed to establish the charge; she told him on many occasions that she wanted him to leave the place; she told him this some three or four years before the hearing of the cause, and asked the complainant to divide the property with her, which he did, with the view of getting to stay at home.

The evidence is quite conclusive that the defendant accused the complainant of running around and being intimate with women, and for this reason refused to live with him. She testified "I told my husband in the house one time, if he did not quit running around with other women, he should leave, that he should go away; I said he ran around with other women, he was no good."

The complainant denied that he was ever intimate with other women, and his contention finds support by the evidence of John C. Balk, who testified that he was at the home of complainant and defendant during the years 1921, 1922, 1923 and 1924, and was acquainted with the complainant, and as to the kind of a husband he was; that he was very pleasant and made the defendant a good home. It was his opinion complainant did not go out with other women. Balk also testified that he a conversation with the defendant as to why she did not want to live with the complainant, and she claimed that the complainant was going out with other women. The evidence further shows that the defendant had no personal knowledge of the complainant running around with other women, and offered no testimony from any witness or witnesses bearing upon that question, other than her own surmises, and all testimony relating to other women, on the part of the defendant, was stricken from the record.

The rule is that where the wife wrongfully accuses a husband of having improper relations with another woman, she is guilty of wilful desertion, and the husband is entitled to a divorce on the grounds of desertion, when this accusation is not true.

The test is that where the defendant's conduct is a breach of duty, the defendant is liable for the consequences of that breach, and is liable to the extent of the breach. The defendant is liable for the consequences of that breach, and is liable to the extent of the breach.

In *Mathison vs. Mathison*, 187 Ill. App. 612, Anton O. Mathison filed a bill against Julia Mathison for divorce on the ground of desertion. Defendant filed an answer, denying desertion by her, but alleged that her husband left her, claiming that she had ceased marital relations with her husband on account of improper relations with another woman, and filed a cross bill asking for separate maintenance, for the reason that her husband had had improper relations with another woman. The court entered a decree dismissing the bill for divorce, and granting relief on the cross bill for separate maintenance, and from the decree of the circuit court, Anton O. Mathison, appealed. The decree of the circuit court was reversed and a divorce was granted to the husband on the ground of desertion. The court held that when a wife falsely accused a husband of having improper relations with another woman, and refused to live with him, the husband is entitled to a divorce from the wife on the ground of desertion.

Where the wife so conducts herself that the husband is compelled to leave her, or is justified in so doing, it may be inferred that she intended to produce that result, and the husband, leaving in such case, would be desertion on her part, not on the part of the husband. *Johnson v. Johnson*, 125 Ill. 510-515-516. The husband is not bound to live and cohabit with his wife if she has pursued a persistent, unjustified and wrongful course of conduct towards him, which renders his life miserable and intolerable. In such a case the husband is entitled to a divorce on the ground of desertion. *French v. French*, 302 Ill. 152-160-161.

In a suit for divorce, on the ground of desertion it is immaterial whether the husband or wife leaves the marital home; the one who intends to bring the cohabitation to an end, commits desertion; the party who drives the other party away, is the deserter, a wife may drive her husband away. *Hudson v. Hudson*, 59 Fla. 529. Vol. 21 Annotated Cases, 278-279.

It is evident from the record that the Chancellor decided

this case on the question of law rather than the question of fact; it is quite apparent that the denial of a decree to the complainant, was based upon the chancellor's view of the law, arising from his understanding of the settlement agreement, entered into by the complainant and the defendant. We gather this from the brief of the defendant, where it is contended that a divorce cannot be granted on the ground of wilful desertion where the parties have mutually agreed to live separate and apart. Many authorities are cited in support of that contention. There is no doubt about the rule of law, but the error here is that nothing contained in the agreement discloses any contract to live separate and apart. It merely states that the parties, on account of domestic troubles, are unable to agree and live together as husband and wife.

Agreement for property settlement between husband and wife, where there is no mutual consent to live separate and apart, does not bar action for divorce on the ground of desertion and for good cause shown, divorce should be allowed. *Parker v. Parker*, 28 Ill. App. 22-24; *Canning v. Canning* 87 Vermont 492; annotated cases 1916-C. 344-346-354-356.

A separation agreement between a husband and wife, fixing their property rights, will not effect the right of either to sue for a divorce, for causes occurring either before or after the agreement. *Archbell v. Archbell*, 158 N.C. 408; Annotated Cases 1913-D, 261.

We are of the opinion that there is nothing in this settlement agreement which precludes the husband from his right to maintain an action for divorce on the ground of wilful desertion, and from what is shown by the evidence we further believe, the complainant is entitled to a divorce. Decree therefore of the Circuit Court of Whiteside County will be reversed, and the cause remanded to that court with directions to enter a decree as prayed for in the bill of complaint.

Reversed and remanded with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 L.A. 222

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 22 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The Gloucester State Bank, a
corporation,

appellee,

vs.

Appeal from the Circuit Court of
Rock Island County.

Henry W. Horst Company, a
corporation,

appellant,

Jones, J.

The Gloucester State Bank brought an action in assumpsit against Henry W. Horst Company. The declaration contained only the common counts. A Bill of particulars was afterwards filed. The defendant filed a plea of the general issue with notice of special defense. At the conclusion of all the evidence, plaintiff made a motion for a directed verdict. The motion was in writing and assigned as grounds therefor that there was no competent evidence tending to disprove the plaintiff's claim; that the matters stated in the notice of special defense do not constitute a defense to any part of the plaintiff's claim; and that any evidence to sustain such notice is incompetent. The defendant also moved for a directed verdict, but its motion was denied and the motion of the plaintiff was allowed. A verdict was accordingly returned for \$3007.93 for which judgment was rendered. This appeal follows.

The giving of a peremptory instruction for a directed verdict in behalf of the plaintiff makes it necessary for us to inquiry only whether the evidence when viewed in a light most favorable to the defendant, tended to establish a defense to the plaintiff's claim. We are not permitted to weigh the evidence. Our duty is to examine the record and ascertain whether or not there is any evidence in it which fairly tends to establish a defense.

Under the bill of particulars filed by the plaintiff, its claim is for rent of an Erie Steam Shovel from June 29th, 1926 to November 15, 1926, and from November 15, 1926 to February

100

. L. none

7, 1927 at \$550 per month. A credit of \$438.72 was allowed leaving a balance due of \$3924.62.

The notice of special defense states in substance that on the 9th day of June, 1926, the Sterling Construction Company, a corporation, was indebted to the defendant in excess of \$6,000; that said corporation was in possession of and purported to be the owner of the Erie steam shovel in question; that said corporation was the owner and in possession of said steam shovel for sometime prior to June 9th, 1926 and used it in doing certain work for the defendant; that on said day, the defendant was led to believe and did believe that said corporation was still the owner of said steam shovel and thereupon leased it from said corporation at a rental of \$550 per month; that said corporation was then financially embarrassed and unable to pay its said indebtedness to the defendant; that the lease was made upon the understanding and with the intention that the rentals to accrue should be applied towards the payment of the indebtedness from said corporation to the defendant; that neither said corporation nor the plaintiff ever gave the defendant any notice whatever that the steam shovel did not belong to the Sterling Construction Company or that it belonged to the plaintiff; that the plaintiff never claimed or demanded any of the rentals until December 16, 1926, or made any claim to the defendant that it was the owner of the steam shovel; that said last mentioned date was the first time the defendant was informed that the plaintiff claimed any interest in the steam shovel; that the Sterling Construction Company was insolvent and unable to pay its indebtedness; that the only payments on the indebtedness due from it to the defendant were derived from rentals which accrued under said lease prior to the date of said notice of plaintiff's claim; that said rentals up to said date have been credited upon the indebtedness of the Sterling Construction Company to the defendant; and that the defendant is ready and willing to pay to the plaintiff all rentals which have accrued subsequent to said date, provided plaintiff is lawfully entitled to them.

It seems clear enough that where a person is sued for rent, he has a good defense if he can show that his title to the demised property was not derived from the plaintiff, but was derived from another who was in fact the owner of the property, or who was so possessed of it, that the possession carried with it such indicia of ownership, as to estop the true owner from asserting title against the purchaser. Such is the defense which is set up in the notice. A motion for a directed verdict in favor of the plaintiff could only be granted in the event there was no evidence fairly tending to prove this defense. (Morgan v. N. Y. C. R. R. Co., 327 Ill. 339; Shannon v. Nightingale, 321 id. 168.) There is not much conflict in the evidence. The facts are that the Sterling Construction Company was an Ohio Corporation, organized in 1922 by Quentin C. Hasson, C.B. Hasson, his brother, their respective wives, and Thomas M. Hatch. It purchased from the Ball Engine Company an Erie steam shovel, under a conditional sales contract, termed in the record, a "lease purchase agreement". This agreement was not offered in evidence but it appears that the Sterling Construction Company made a down payment on it and agreed to pay the remainder of the purchase price in installments. The Sterling Construction Company obtained a sub-contract from the plaintiff, Henry W. Horst Company, an Illinois corporation, also engaged in construction work, especially in hard road building. It had a contract with the State of Pennsylvania to build a section of hard road and it was in connection with this contract that it sublet a portion to the Sterling Construction Company. The steam shovel was used on this work. Before the road was completed, the Sterling Construction Company became heavily involved financially and was unable to meet its obligations or to perform its sub-contract without assistance. This situation was made known to Henry W. Horst Company and it entered into a new contract with the Sterling Construction Company whereby the latter Company was to continue the work and the Henry W. Horst Company would render it financial assistance. The work on this road was not completed until the spring or summer of 1926.

Because of the provisions of the contract between the Henry W. Horst Company and the State of Pennsylvania, as well as the necessity for making final estimates and the acceptance of the work, the final figures were not obtained until December 1926 and it was not known and could not be known until then just how the accounts between Henry W. Horst Company and The Sterling Construction Company stood, but every circumstance indicates that during all that time the Sterling Construction Company was largely indebted to Henry W. Horst Company.

~~That~~ The Sterling Construction Company was also indebted to the Gloucester State Bank, an Ohio Corporation, and the plaintiff herein. The Construction Company being unable to meet its indebtedness to the bank made an assignment of its "lease purchase agreement" to the bank in 1926, approximately two years prior to the date of the subcontract between the two construction companies. The bank never took possession of the steam shovel at any time. Neither did it ever give any notice to the defendant that it claimed any title or interest either in the machine or in any profits or rentals which might be derived from it. So long as the Sterling Construction Company continued to do business, it possessed it, used it, and exercised complete dominion over it, so far as the parties to this suit are concerned as fully and completely as though said company had been the sole and unconditional owner of it.

Because of the failing financial condition of the Sterling Construction Company, the associates of Quentin Hasson dropped out of the Company and he was left alone to manage the operations of his Company and to rehabilitate it, if possible. In the Fall of 1925, he wrote a letter to the Henry W. Horst Company known as "Defendant's Exhibit 3". He signed it "Sterling Construction Company by A. C. Hasson, President." The letter confessed the Sterling Construction Company's inability to pay for labor and material and authorized the Henry W. Horst Company to withhold all money due the Sterling Construction Company in satisfaction of its indebtedness to the Henry W. Horst Company. This letter was denied admission in evidence. We think the ruling

was improper because the letter tends to support the defendant's contention that the alleged lease of the steam shovel was in part based on a consideration growing out of an intent to liquidate an indebtedness due from the Sterling Construction Company to the Henry W. Horst Company. It also tends to show that Quentin C. Hasson was holding himself out to be the President of a going concern, as late as the Fall of 1925.

The defendant in 1926 also had some contract work in Adams County, Pennsylvania. The shovel was not then employed and was still at Tower City where the other work had been done. Quentin C. Hasson solicited F. J. Colosey, who was in charge of the operations of the defendant company to rent the shovel and to give him a job of operating it. His proposition was accepted. Hasson was to receive \$225 a month as wages and the defendant was to pay a monthly rental to be fixed at a later date. Colosey afterwards set a price of \$550 per month which appears from the record to have been a satisfactory price to all parties concerned. The shovel was used during the periods of time set forth in the bill of particulars. Payment checks were issued monthly by the Henry W. Horst Company at its principal office in Moline, payable to the Sterling Construction Company. They were forwarded to Colosey and were retained by him at the Pennsylvania office and not delivered to the Sterling Construction Company. In December, 1926, when the final figures were received on the Tower City job, the rental checks were returned by Colosey to the Moline office of the defendant, where they were credited on the indebtedness of the Sterling Construction Company and then cancelled.

On December 16, 1926, the Gloucester State Bank wrote a letter (Def't's Ex. 10) to Colosey addressed to him at Harrisburg, Pennsylvania, in which the bank stated that it owned the Erie shovel which Hasson had been operating; that rent for it was to be forwarded to the bank, but to date, none had been received. The letter contained a request for information as to whether or not the rental had been paid to Hasson and asked that if it had

not been so paid, when it could be forwarded to the bank. The evidence discloses that the letter was not received by Colosey until December 26, 1926. He testified it was the first notice he ever had from the Gloucester State Bank that plaintiff owned or claimed any interest in the shovel. Hasson's testimony tends to show that Colosey had notice of plaintiff's claim at an earlier date. While he does not expressly say that he ever told Colosey of the nature or extent of the bank's claim, or even that the particular bank had any claim, still, he did testify that he told Colosey that the banks had title to all the equipment of the Sterling Construction Company.

We have not attempted to stress the evidence offered on behalf of the plaintiff. In determining the correctness of the peremptory instruction given by the trial court, our province is to search the record for competent evidence which is sufficient to require a submission of the cause to a jury. We have already said that the notice of special defense contains matter which, if proved and not avoided, would constitute a defense. The record contains evidence tending to prove every material averment contained in the notice. It was therefore error for the trial court to direct a verdict. The cause should have been submitted to a jury.

In view of the likelihood of another trial, we deem it advisable to express our views concerning other errors in the record. The trial court permitted witnesses over the objection of the defendant to testify that the bank was the owner of the steam shovel at the time it was leased to the defendant. The pleadings did not aver ownership in the plaintiff nor indeed was it necessary to do so. But the fact that it was not so averred relieved the defendant of the duty of expressly denying ownership of it by a special plea. From the present condition of the record, we are not able to say that the plaintiff was ever the owner of the shovel. The "lease purchase agreement" was not produced but we gather from the evidence that the Ball Machine Company retained title of ownership until the shovel was fully paid for. It also appears that the bank, on July 16, 1927, assigned the

agreement to W. H. Shaul & Son. Whether or not the shovel has ever been paid for and the Ball Machine Company divested of title does not appear. It is essential that the bank show its right to collect the rentals sued for. To do so, it must show the basis of that right. The right may be derived from ownership or it may be a possessory one, but whatever it is, it must be shown by competent evidence and not by expressions of mere opinions. The court erroneously refused to permit the defendant to make proof of its expense and the circumstances under which certain repairs were made.

Plaintiff insists that as a matter of law the defendant is not entitled to a set off. The ground for this contention is that Hasson in making a lease of the shovel was acting as an undisclosed agent of the plaintiff and that defendant might lawfully set off a claim against him personally, but it cannot set off a claim against the Sterling Construction Company. The theory of the plaintiff is that the defendant dealt with Hasson individually without knowledge that he was the agent of the plaintiff. But such is not the theory of the defendant. Its theory is that its dealings with respect to the shovel were not with Hasson individually, but with him as the representative of the Sterling Construction Company. It had dealt with that Company when it had undisputed right and title to possession and insists that at the time the lease was entered into, it had a lawful right to presume it was still the owner; that it had a right to take into consideration the liquidation of the Sterling Construction Company's debt, when it bargained for the use of the shovel; that the name of the Sterling Construction Company was emblazoned on the shovel in letters eight inches high; and that the entire course of conduct of both Hasson and the bank was sufficient to induce an honest belief in the defendant that the Sterling Construction Company had the right through Hasson to lease the machine. These two theories were each supported by evidence and it is not for the courts to determine which is correct as a matter of law. The true solution must be found from the facts and circumstances shown

on the trial. A jury is the proper arbiter.

It seems also to be the theory of the plaintiff that a dissolution order had been entered in the State of Ohio against the Sterling Construction Company, and therefore that company had no corporate existence, and that the defendant could make no contract with it. There is no competent proof in the record that the Corporation was ever dissolved. But whether it was or not is of little consequence, so far as the defendant's case is concerned. The evidence in its behalf tended to show that the Corporation was still holding itself out as a going concern with full corporate powers; that it was possessed of a steam shovel and other property; that the plaintiff permitted this situation to obtain; that it authorized a leasing; that it authorized Hasson to lease it; that Hasson held himself out to defendant as the president of the Sterling Construction Company in making the lease; that the defendant leased the shovel under the belief that the Sterling Construction Company was the owner of it; that in entering into the lease, the defendant did so partly in consideration of its intent to obtain satisfaction of its claim against said company; and that the defendant believed the company had an actual existence and dealt with it accordingly.

Because of the error in directing the verdict, the judgment is reversed and remanded.

Reversed and remanded.

2006 - 2007 Season

STATE OF ILLINOIS, }

SECOND DISTRICT

ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

254 T.A. 622²

BE IT REMEMBERED, that afterwards, to-wit: On
May 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



IDA M. HINKLE,	:	
Appellee,	:	
	:	
vs.	:	APPEAL FROM THE
	:	CIRCUIT COURT OF
BLOCK & KUHL COMPANY,	:	PEORIA COUNTY.
a Corporation,	:	
Appellant	:	

JONES J:

Ida M. Hinkle, plaintiff, recovered a judgment in the circuit court of Peoria County against Block & Kuhl Company, defendant, for \$6308.38. The cause is in this court on appeal. Block & Kuhl Company operates a department store in the City of Peoria. Mrs. Hinkle, prior to receiving the injuries complained of, was about 55 years of age, in good health, and with approximately normal eyesight.

Accompanied by her daughter, Mrs. Mary J. Pankey, and her granddaughter, Charlotte Pankey, now deceased, plaintiff entered defendant's store on the main floor, occupied by the "Furniture Exchange". This room is approximately 35 feet wide east and west and 70 feet long north and south. In this department are kept for sale furniture, rugs, pianos, linoleum, and other articles. Plaintiff and those who accompanied her, were approached by a salesman who asked them to look around for awhile as he was busy with a customer. Charlotte seated herself at a piano and played it. Mrs. Hinkle, desiring to look at some linoleum, proceeded to a place near the east wall. The linoleum was against the wall and a short distance from the head of a stairway leading into the basement, where a cheaper grade of furniture was kept. The stairway consisted of 16 or 17 cement steps bound with iron. The opening in the main floor from which it descended had around it two guards of one and one-half inch iron pipes running along the west side of the opening and immediately opposite the wall. They were held in place by newel posts, one at the north end of the opening, and the other at the south. From the south newel post, two other iron pipes of like dimension extended to the wall, so that there was a protection consisting of the wall on the east side and guard rails or pipes on the west and south

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 11-11-93 BY 6032

JOHN M. WINKLE
BLOCK & BURN COMPANY
a corporation

LOUISIANA

John M. Winkle, residing at the
address of the defendant, was
defendant, born 1883, 38. The same is in the
Block & Burn Company, a corporation, and
resides at the address of the defendant.
The defendant, prior to receiving the
defendant, was about 35 years of age, of the
defendant, approximately 5 feet 10 inches tall.

Accompanied by the defendant, the
and her husband, the defendant, and
entered defendant's store on the date of the
"Remittance Statement". This was the
east and west end of the store, and
defendant was kept for sale, and
and other articles. Defendant and
were approached by a salesman who
for while as he was busy with a
himself as a piano and placed it
look at some furniture, and the
wall. The furniture was placed
from the north of a doorway leading
a cheaper grade of furniture was
of 16 or 17 years ago, and the
again from the north end of the
of one and one-half inch pipes
side of the opening and immediately
were held in place by metal
opening, and one of the pipes, and the

sides of the opening. The entrance to the stairway, being on the north side, was open and unguarded.

Mrs. Hinkle fell down the stairway and received severe injuries. Her skull was crushed, causing concussion of the brain. She was in a hospital for a considerable length of time in a semi-conscious condition. She was unable to perform her usual work for a number of weeks. According to her testimony she has been weak and nervous ever since. An oculist testified that she has an optic atrophy and the evidence tends to show that there is a causal connection between the injury to her head and the present condition of her eyes.

It is the contention of plaintiff that the accident occurred as a result of insufficient light where the stairway was located and that the railing on the south and west sides of the opening in the floor was entirely concealed by furniture and rugs packed around it. Much stress is placed on the latter point, but we are unable to comprehend its importance. Plaintiff did not fall into the stairway pit from the west or south side where the railing was located. The pit was protected on those sides not only by the railing but by a davenport and other furniture set near the railing for ~~display~~ display. The wall was on the east side and the only open side was on the north. Plaintiff in approaching the wall passed around and beyond the guard rails as well as the furniture next to them. The guard rails had nothing to do with the accident, and the fact that furniture and rugs were about them, did not increase or affect the hazard in any way.

The question in this case is whether or not there was sufficient light upon the stairway so that a person situated as Mrs. Hinkle was, could have seen it in the exercise of ordinary care. No one saw her fall. Neither was anyone apprised of it through any scream or noise. Mrs. Pankey was west of the railing and against a davenport, about six feet from the opening. Having noticed the disappearance of her mother, she went around the end of the newel post to the opening and looked down. She said she could not see to the bottom of the stairs until she had gone down several steps; that she then observed her mother lying in the basement against a buffet, a portion of which had

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broken off and was across her mother's breast; that upon her call for help, a man came and they carried Mrs. Hinkle up the stairs to the main floor. Mrs. Pankey also testified that when she was in the basement, she could see distinctly and observed her mother's condition and the buffet or dresser against which she had fallen. She and her mother testified that it was a dark day between 11 and 12 o'clock in the forenoon. They were not well acquainted with the location of the artificial lights but their testimony was to the effect that while the central portion of the room was well lighted, it was dark at and near the stairway opening. Mrs. Hinkle did not testify how she happened to fall or whether she fell forward or backward. No other witnesses testified in behalf of the plaintiff on the question of light.

For the defendant five witnesses, each of whom were intimately acquainted with the physical conditions which obtained in the store, testified as to the existence of light, both natural and artificial. They denied that the railing was completely obscured by furniture and rugs. While we have expressed the view that this is an immaterial matter, their testimony on this point is pertinent only because it illustrates their acquaintanceship with the conditions as they existed.

M. L. Fuller, United States weather bureau observer, at Peoria, testified that the day was not a dark cloudy day, but was bright throughout. Other witnesses for the defendant testified likewise. It was shown that the room had a number of artificial lights, which were constantly lighted for the purpose of better displaying colors and preventing shadows; that the room in all its parts was well lighted and that ~~the~~ the north opening onto the stairway was plainly visible. There are some matters in proof which definitely corroborate these witnesses. One of them is that Mrs. Hinkle, while examining the linoleum, called to her daughter who was standing south of the davenport, and said, "Isn't that a pretty piece?" Mrs. Pankey answered that it was. If the colors and appearance of linoleum could be readily distinguished at a distance of six feet, it is difficult to understand why the opening to the stairway within a foot or two of where Mrs. Hinkle was stand-

ing, could not have been noticed.

The witness, Johnson, testified that there was a 100 watt ceiling lamp in the basement about 12 feet west of the bottom of the stairs. This lamp was lighted and reflected over the bottom of the stairs. This testimony is not denied. It is also significant that Mrs. Panky and a salesman carried Mrs. Hinkle up the stairway after the injury. It is not likely they would have done so, if the stairway had been very dark. There is no evidence that any light was turned on after the accident. More than that, the testimony shows that the stairway had been in continuous use for 20 years. There was nothing defective about its construction, and it does not appear that an accident ever occurred on it other than the one which happened to Mrs. Hinkle. To us, the inference is irresistible that if Mrs. Hinkle had been in the exercise of ordinary care for her own safety, she could have observed the stairway and prevented her injuries.

Counsel for defendant asks us to hold that the trial court erred in not allowing them to ask Mrs. Hinkle if she would submit to a physical examination by a physician of their selection. They say, "that it is the settled law of this state" that a plaintiff in a personal injury case cannot be compelled to submit to a physical examination. (Mattice v. Klawans, 312 Ill. 299.) But they contend that the holding in the case is in direct contradiction to the law as it had existed prior to the rendition of the opinion and is out of harmony with the weight of authority in other jurisdictions. However that may be, such an argument must be addressed to the Supreme Court rather than to this Court.

We hold that the verdict herein was against the manifest weight of the evidence and the judgment is accordingly reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25-1.A. 622³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



FRANK E. OURSLER, et al,	:	
Appellants,	:	
	:	
vs.	:	APPEAL FROM THE CIRCUIT
	:	
MARVIN GUSTAFSON, et al,	:	COURT OF WINNEBAGO COUNTY.
as Johnson & Johnson,	:	
Appellees,	:	

JONES J:

The title of this cause as shown by the briefs is incorrect. Marvin Gustafson and J. A. Johnson, copartners, doing business under the name and style of Johnson & Johnson, brought a suit against Frank E. Oursler, before a justice of the peace and recovered a judgment for \$155.65. Defendant appealed to the circuit court of Winnebago County and a trial by jury resulted in a verdict and judgment in favor of plaintiffs and against defendant for \$145 and costs. This is an appeal from that judgment.

Plaintiffs are real estate brokers in the City of Rockford. They had in their employment, Earl G. Davis, who learned that the defendant Oursler was the owner of a restaurant called "One Minute Lunch", and that it was for sale. He called on Oursler at his place of business on or about November 9, 1928, and asked Oursler to list the property with his firm for sale. Oursler stated that he would sell the restaurant for \$2500. According to the testimony of Davis, Oursler agreed to pay a commission of \$155, which was calculated on a basis of 8% on the first \$1000 of the purchase price and 5% on the excess. Oursler admits that he stated to Davis that "on a cash deal, I'll pay some commission on the \$2500." Davis testified that his computation of the commission was made by him on a piece of paper and handed to Oursler. Oursler, however, denies that he received any paper on which the commission had been figured.

Subsequent to such listing of the property for sale, Davis interested Burton Hassinger as a prospective purchaser. Hassinger was not acquainted with Oursler. He inspected the restaurant and after several days' consideration, he made Davis a verbal offer to Oursler who rejected it and stated that

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\$2300 was the least price he would accept for the place. Further negotiations resulted in Davis obtaining from Hassinger a written offer to purchase at \$2300, one-half cash and other half in notes secured by chattle mortgage. The offer was accepted by Oursler, the sale was concluded, and Hassinger took possession of the premises.

The defendant claims that ^{at} the time he accepted the offer to purchase he told Davis that \$2300 must be net to him. Davis denies that Oursler made such a statement. A decision of the case depends upon a determination of the proof of the respective claims. No other witness was present at the time the alleged statement was made.

The record shows that when Davis went to Oursler with a written offer to purchase and Oursler had orally agreed to accept it, Davis asked Oursler to sign the agreement. Oursler declined to do it until he had consulted with his lawyer. Thereupon they went to the office of Karl J. Mohr, where the details of the trade were carefully worked out so that Oursler would receive the amount of the purchase price in the manner and upon the terms agreed to. The matter of safeguarding the parties under the Bulk Sales Law was given careful attention, but it nowhere appears that Oursler ever said in the presence of his attorney, Mohr, or Davis that his original agreement to pay a commission had been rescinded, and that he was not to pay a commission on a sale price of \$2300. The facts in this case show (1) that the defendant employed the plaintiffs as his real estate brokers to negotiate the sale of his restaurant and (2) that plaintiffs, acting as the agent or broker of the defendant, produced a buyer of the property listed, who was accepted by the defendant. In this state of case, the only question remaining is whether or not there was an agreement to pay a commission. It is one of fact. Two juries have found in favor of the plaintiffs, and our examination of the record inclines us to a belief in the correctness of their finding. The testimony of Davis seems to be the more probable and the law is that a broker is entitled to recover commissions if he finds a buyer on the terms of the original contract or

conclusion of the business.

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to whom his client finally sells the property upon other terms agreed upon between the buyer and the seller. (Rasar & Johnson v. Sperling, 176 Ill. App. 349; Hainer v. Horron, 165 Ill. 242.)

Both parties agree that under the original contract of employment, plaintiffs were to receive a commission in the event a purchaser was obtained at the price fixed by the seller. The plaintiffs claim that the amount of the commission was definitely fixed while the defendant claims that no fixed amount was agreed upon. In this case it makes no difference which theory is accepted. Under plaintiff's theory, the compensation would amount to \$145. Under defendant's theory, if any amount at all is ~~xxxx~~ recoverable, it would be upon a quantum meruit and the evidence shows that the usual and customary fee under similar circumstances would be \$145. If there was no meeting of the minds upon the amount of the fee, the result would be the same. (People's Casualty Claim Adjustment Co. v. Darrow, 172 Ill. 62.)

The defendant's contention in this case was squarely submitted to a jury under the following instruction:

"The Court instructs the jury that if you believe from the evidence that the defendant listed his property for sale at a net price to himself, and that there was no special agreement as to the amount of commission to be paid, then the plaintiffs are not entitled to any recovery and the jury should find the issue for the defendant."

The finding of the jury against the defendant cannot well be disturbed. No prejudicial error was committed by the court's refusal of any instructions tendered by the defendant.

The judgment is therefore affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

65-202
Begun and held at Ottawa, on Tuesday, the ^{First} ~~Seventh~~ day of ^{October} ~~May~~, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:
Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25471 622 4

BE IT REMEMBERED, that afterwards, to-wit: On
1 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

WALTER E. HELLER and ARMAND S.:	
DEUTSCH, Co-Partners trading :	
as National Traders Finance :	APPEAL FROM
Co. :	COUNTY COURT OF
Appellants, :	MCHENNRY COUNTY.
v. :	
GEORGE V. ANDREW, :	
Appellee, :	

JONES P.J.

An action was instituted by appellants against appellee, George V. Andrew, to recover on two trade acceptances, dated September 9, 1924. One of them was for \$100 due in 90 days and the other for \$104.50 due in 120 days. The declaration contained two special counts and the common counts. Appellee filed a plea of the general issue and a verified plea that no valid assignments of the trade acceptances had been made to appellants. A trial was had resulting in a verdict for appellee and judgment against appellant in bar of the action and for costs.

The trade acceptances were drawn on Andrew by "Aristocrat Manufacturing and Distributing Company J. B. Vallen". The testimony on the part of the Finance Company is that on October 15, 1924, they purchased the two trade acceptances and also one other, and paid therefor 77% of the face value. Each acceptance bears the following endorsement on the back "Aristocrat Manufacturing and Distributing Company by J. B. Vallen." Vallen represented to appellants that the Aristocrat Manufacturing and Distributing Company was a co-partnership consisting of himself and a man by the name of Johnson; and before appellants purchased the trade acceptances they made an investigation of the affairs of the payees through R. G. Dun & Company.

Andrew testified that his dealings were with two men by the names of Hill and Tucker when he signed such trade acceptances; that they stated to him they were partners comprising the firm of Aristocrat Manufacturing and Distributing Company, and that at the time he signed the acceptances, the name

of J. B. Vallen did not appear below the printed signature of the Aristocrat Manufacturing and Distributing Company. About two months after the acceptances were executed, appellee paid one of the trade acceptances, and the record shows it then bore the name of J. B. Vallen below the name of the drawers.

Appellee admitted that he had no information except what Tucker and Hill told him as to who constituted the Aristocrat Manufacturing and Distributing Company, and that he did not know whether Vallen was a member of the co-partnership or not. He based his defense upon the ground that the acceptances had not been properly assigned and transferred to appellants but the testimony does not support his contention. The record conclusively shows that appellants were in possession of the acceptances; that they became the holders thereof in good faith and for value, before maturity, without notice of dishonor or of any infirmity in the instruments or defect in the title of the person negotiating them; and that the instruments are complete and regular on their face. We therefore conclude that the verdict was against the manifest weight of the evidence. Under such circumstances, appellants were holders in due course. (Sec. 52 Neg. Inst. Act. Chap. 98 Sec. 52, Rev. Stat.)

Appellant's refused instructions 10, 12 and 13 relate to the rights of holders in due course and should have been given. The 8th instruction given on behalf of appellee told the jury that the one issue is whether or not the Aristocrat Manufacturing and Distributing Company had assigned the acceptances offered in evidence, and in order to make the assignment good and valid, it must appear that the party who made it had authority and was a partner in said concern, and if it has not been proven by a preponderance of the evidence that J. V. Vallen was a partner and had authority to assign said acceptances, they must find the issues in favor of the defendant. The question of assignment was not the only issue raised by the pleadings, and even that issue did not rest upon the question of whether or not Vallen was a partner. The instruction calls for more proof than the pleadings required. For the errors above set out, the judgment of the trial court is reversed and the cause remanded.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ^{First} ~~Seventh~~ ^{Ottawa} day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2541A 622⁵

BE IT REMEMBERED, that afterwards, to-wit: On

1929

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE MATTER OF THE	:	APPEAL FROM THE
ESTATE OF SARAH J. OWEN,	:	CIRCUIT COURT OF
DECEASED,	:	WINNEBAGO COUNTY.

JONES J:

The administrator of the estate of Sarah J. Owen, deceased, filed a petition in the probate court of Winnebago County representing that Ralph H. Hughes and Blanche McCarthy had in their possession, certain notes belonging to said estate and refused to turn them over to the administrator. The prayer of the petition was for an order upon said Hughes and McCarthy to turn them over to the administrator. The probate court held that appellants were the owners of the notes by reason of a valid gift to them by the decedent, Sarah J. Owen. An appeal was taken from such order to the circuit court and the cause was tried, under a stipulation, upon a transcript of the evidence heard in the probate court. The circuit court held the alleged gift was ⁱⁿ valid and ordered the appellants to deliver over the notes to the administrator. The cause is in this court on a further appeal.

Nine days before the death of Sarah J. Owen, and while she was confined to her bed at home, she requested appellant, Ralph H. Hughes, to have Frank Welsh, a practicing attorney of Rockford, Illinois, come to her home. Hughes brought Welsh to her house on or about July 24, 1927. She directed Hughes to bring to her a box in which she kept her papers. He brought it and it was opened in her lap. During a conversation between Mrs. Owen and Attorney Welsh, she stated, "Well, Sir, I don't know what is the right thing to do. Welsh replied, "Mrs. Owen, it isn't a question of what is the right thing to do. The reason I am here, as I understand it, is to find out what you want to do. It doesn't make any difference to me. What I want to find out is what is in your mind--what you want to do." After some further conversation, she said, "Well, I don't know what is the right thing to do. The people down the street haven't been

nice to me. I don't know what is the right thing to do." Finally she said, "Let's see what is in the box." Among the papers removed was a certificate of stock known as the "Roper stock". It was assigned to appellants at that time and delivered to Hughes for them.

Mrs. Owen also executed a deed to Martha Hopkins, reserving a life estate to herself, and directed Welsh to have the deed recorded. Welsh testified that when the notes were discussed, he asked Mrs. Owen if she wanted him to take them and hold them for appellants and she replied in the affirmative; that a discussion arose about funeral expenses, grave markers, etc. in which Hughes stated, "Auntie, I will take care of the funeral expenses. I will stay there until your body is covered up. I will see to a marker and I will pay all the bills that you owe incident to household, perpetual care, and then the balance of these notes, I will divide." Mrs. Owen replied, "Bud, I certainly will be grateful to you if you will do that." Hughes testified that at the time of the transactions detailed, Mrs. Owen stated that she felt very grateful to his sister, Blanche, (Appellant Blanche McCarthy) and desired to give some of the property to her when she, Mrs. Owen, died.

Welsh took the notes from Mrs. Owen and held them until after her death. Ralph Hughes afterwards presented Welsh with receipts for the payment of funeral expenses, etc. whereupon ~~the~~ Welsh delivered the notes to Hughes.

The only question which arises on this record is whether or not Sarah J. Owen made a valid gift of two promissory notes to appellant. In order to constitute a valid gift, either inter vivos or causa mortis of personal property, it is necessary that possession be delivered during the lifetime of the donor with the intent to transfer the title at the time of delivery. It is essential to a donation inter vivos that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, and that there be such a change of possession

Mrs. Owen also answered a letter to the President,

reserving a life estate to herself, and directed that she have the deed recorded. When she returned she was told that the deed was recorded, and she was told that the deed was recorded, and she was told that the deed was recorded.

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as to put it out of the power of the giver to repossess himself of the thing given. The delivery must be made with the intent to vest the title in the donee. The delivery may be to a third person for the benefit of the donee, instead of being made directly to the donee himself. (Telford v. Patton, 144 Ill. 611). But in order to constitute a valid delivery to a third person, the third person must be the agent of the donee and not of the donor. (Barnum v. Reed, 136 Ill. 388; Neville v. Jennings, 75 Ill. App. 503; Taylor v. Harnison, 179 Ill. 137.) Where the third person is the agent of the donor and is directed to complete an unexecuted gift on the death of the donor, the death of the donor operates as a revocation of the agency and the gift is defeated. (Taylor v. Harnison, supra.)

The record in this case shows that Welsh was the attorney of Mrs. Owen and that he held possession of the notes as her attorney and not as the attorney for appellant. Such being the case, the gift was not completed in her lifetime. Upon her death the agency terminated. Welsh testified that he asked Mrs. Owen if she wanted him to hold the notes for appellants and she answered "Yes", still, in view of the fact that he was her attorney, and the record does not admit of an inference that he was acting for anyone else, we hold that she could have revoked the gift at any time and that it was not completed in her lifetime. According to our view of the evidence, the decedent did not intend to transfer the title during her lifetime, but after her death. The transaction was an attempted testamentary disposition of her property. (Troup v. Hunter, 300 Ill. 110.) She delivered the notes to her agent and attorney with directions as to their disposition after her death. She could have terminated the agency at anytime during her lifetime. Where a gift is not completed in the lifetime of the donor, it fails. (Weaver v. Weaver, 182 Ill. 287; Telford v. Patton, supra; First Trust, etc., v. Austin, 243 Ill. App. 386; Williams v. Chamberlain, 165 Ill. 210.)

We are of the opinion that the order of the circuit court was correct and it is accordingly affirmed.

Order affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ~~Seventh~~ ^{First} day of ~~May~~ ^{October}, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25-1.A. 628¹

BE IT REMEMBERED, that afterwards, to-wit: On

207 1025 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

FEBRUARY TERM, 1929

R. A. GROSS,

APPELLANT

VS

FREDERICK KLAG, MAGGIE
KLAG, his wife,
ROY H. BROWN, trustee,
BARNEY J. GHIGLIERI,
trustee,

APPELLEES.

APPEAL FROM THE CIRCUIT COURT
OF BUREAU COUNTY.

Jett, J.

This is an appeal from a decree of the Circuit Court of Bureau County, dismissing the bill of R. A. Gross, appellant, against Frederick Klag and Maggie Klag, his wife, Roy H. Brown, trustee, and Barney J. Ghiglieri, trustee, appellees, to foreclose a trust deed executed by appellees, Frederick Klag and Maggie Klag, to Roy H. Brown, trustee, given to secure four notes \$2000.00 each, owned by appellant, two of which had, however, been paid. The cause was referred to the Master to take the proof, and report conclusions both of law and fact. The Master reported the evidence and recommended that the bill be dismissed for want of equity; objections to the Master's report were ordered to stand as exceptions; hearing was had on such exceptions; the court having considered the evidence and the Master's findings, overruled the exceptions, sustained the Master's findings, and dismissed the bill of complaint for want of equity, with judgment and costs assessed against the appellant. From this order and decree this appeal is prosecuted.

The record discloses that R.A. Gross, appellant, on May 2, 1923, filed a bill in the Circuit Court of Bureau County, alleging that on February 9th, 1920, appellees, Frederick Klag and Maggie Klag, his wife, executed a mortgage on the Northeast quarter of Section 28, Town 18, North, Range 7, East of the 4th Principal Meridian, Bureau County, Illinois, to secure four promissory notes for \$2000.00 each; \$2000.00 payable March 1, 1921, \$2000.00 payable March 1, 1922, \$2000.00 payable March 1, 1923, and \$2000.00 payable March 1, 1924; which said mortgage was subject to a trust deed for \$16,000. Said bill alleges that appellees

had failed to pay the taxes on the premises for 1922 and the interest on said \$16,000, trust deed, and had neglected to pay the interest on the third and fourth 2000.000 notes above mentioned and neglected to pay the principal of the third note, and that appellant had elected to declare the whole amount due, and prayed a foreclosure of said mortgage.

To said bill appellees Frederick Klag and Maggie Klag, filed an answer, admitting the execution of said mortgage, but denying that they should be required to pay the same, alleging that the execution of said notes was obtained by the false and fraudulent statements and representations of the complainant and his agent, Harry Whitver, concerning the quality, character and value of said land at the time appellees purchased the same from appellant, and for which said notes were given, by them as a part of the purchase price, and by the otherwise false and fraudulent conduct of the complainant and his agent.

Said answer further sets forth that on September 15, 1919, appellant was engaged in the business of real estate broker, and had been engaged in buying, selling and trading in real estate for a great number of years, and that Harry Whitver, was an agent in appellant's employ and had been for many years prior thereto; that appellant owned the above mentioned 160 acre tract of land in Bureau County, and also a farm of 160 acres in Lee County; that appellee Klag owned a farm of 150 acres in Ohio, and 160 acres in Texas, and that through the fraudulent representations of appellant and his agent, appellees were induced to trade their Ohio and Texas farms for said above described farms in Bureau and Lee Counties, owned by appellant, in which said exchange appellees agreed to purchase said Lee and Bureau county farms, for \$92,000.00 and to pay for the same by conveying to appellant the Ohio farm at \$37,500.00, and the Texas farm at \$8000.00 to assume the mortgage of \$16,000.00 on the Bureau County farm, and to give an additional mortgage of \$8000.00, being the mortgage here sought to be foreclosed, by giving a mortgage of \$12,500.00 on the Lee County farm and paying the balance in cash as of March 1, 1920. Said answer further alleges that on March 1, 1922, appellees were induced by appellant to deed back to him the Lee County farm, by appellant assuming the \$12,500.00 mortgage thereon and surrendering to appellees, notes 1 and 2 described in the mortgage here sought

to be foreclosed, amounting to \$4000.00.

Appellees further allege in their answer that appellant represented that the lands in Bureau County were well tiled and had strings of drainage tile located 20 rods apart; that it was not subject to overflow; that there were no Canada thistles on the same; that there was a little alkali in the soil of the farm, but that said alkali was not bad and did not affect the crop producing character of the soil; that the farm would produce good grain and corn; that "all such statements were false, fraudulent and untrue, and made for the purpose of deceiving appellees and inducing them to purchase said lands."

Appellees further allege in said answer that, after the consummation of the contract, they learned that said statements with reference to the farm being well tiled, with reference to the land being subject to overflow, and with reference to Canada thistles, on the farm, and with reference to there being but little alkali in the soil, "were false, fraudulent and untrue", and made for the purpose of defrauding and cheating appellees.

The questions for determination arising on this record are as to whether the statements made by Gross and his agent, with reference to the tiling on said farm, as to whether the soil was alkali, and with reference to its overflowing, were statements of fact on which appellees Frederick Klag and Maggie Klag, had a right to and did rely, in making such exchange, or whether they were expressions of opinions on the part of appellant and his agent.

Second, as to whether, even if such statements were statements of fact on which appellees had the right to rely, the evidence in the record is sufficient to sustain the finding that they were fraudulently made and were untrue, and that appellees had a right to rely thereon.

Third, another matter that we think should be taken into consideration is the fact that more than one year after the exchange, of the lands were made, appellee sold the Lee County Farm back to appellant, upon appellant's assuming the mortgage thereon and reducing the mortgage of \$8000.00 on the Bureau County farm, to \$4000.00. At that time so far as the record discloses, appellees were making no claim of any false or fraudulent representations.

The record discloses that the answer filed three years after the exchange of the lands in question was made, was the first time that appellees had made any charge against appellant as to

statements made by him or his agent at the time of the trade. They confirmed the sale in part by selling back to appellant part of the lands they originally received in exchange of the property.

The record discloses that in July 1919, R.A. Gross, appellant was, and had been for some years prior thereto, been engaged in the real estate business, buying and selling farms and owned a farm of 160 acres in Lee County and a like number of acres in Bureau County. At that time Frederick Klag, appellee, was residing in La Salle County, which lies immediately east of said Bureau County, and had been a farmer for a period of 30 years or more. He owned a farm of 160 acres in Ohio and one of 160 acres in Texas. At the time in question, Klag said he was able to determine the character of the soil of a farm by looking at it.

In the latter part of July 1919, Klag, with Stanley Topalski, his son-in-law and Hermon Cordes, his step son, both of whom were farmers, went with Klag and others to examine the land for which he traded. They met appellant Gross and his agent, by the name of Harry Whitver, and all went to the Lee County farm owned by Gross, and examined it. The farm proved to be satisfactory to Klag. They all then went to the Bureau County farm in question. The buildings on this farm are in the Northeast corner thereof, and they drove into the yard at that place.

All of the parties that were viewing the premises except a man by the name of Conkling, got out of the automobile and walked in a Southwesterly direction about 40 or 50 rods when Gross stopped and went back to the buildings, but Klag, Topalski and Whitver went to the West side of the farm and Whitver showed Klag the line of the farm and that it did not touch Green River. The land in question was in the Green River Drainage District, Green River being on the West and a ditch about two rods wide, being on the South. Oats and Corn were growing on the land at the time it was visited by Klag and those ~~x~~ that accompanied him. The corn was about as high as a man's head. When Klag and those with him returned from the West side of the farm they all then walked South about two-thirds of the way from the North ~~x~~ to South and went 30 to 40 rods West and back to the buildings.

Appellant Gross asked Klag if he wished to look at the farm further and Klag responded that ~~Klag~~ he had looked it over

and was perfectly satisfied with it. The party was at the farm in the neighborhood of one hour or more. During the time they were going over the farm Klag inquired if there was any tile in the land and Whitver said it was well tiled and Gross told him there was tile in the farm. It appears that there was several main strings of tile and a number of laterals. The plat of the Drainage System offered in evidence shows that it was well tiled. Later on, and after Klag went on the premises, some of the tile were found broken and filled with dirt. It appears that Klag did not inquire as to how many lines of tile there were, the size, where located, nor how far apart. Klag also asked if the land overflowed. Appellant, who had owned the land but a few months, told him that he had not seen it overflow, but he understood a portion of it was subject to overflow and pointed to the Southeastern part of the farm where he understood there was some overflow. Appellant stated that he understood there were about 15 acres subject to overflow. The evidence shows that occasionally from 25 to 30 acres had overflowed.

Klag also inquired if there was alkali on the farm and Whitver said there was a little but did not say where it was or how it affected the crops.

Klag testified that he had asked if there were any Canada thistles on the farm and Gross said there were none that he knew of. The testimony does not show that there were any Canada thistles. The testimony also tends to show that Klag was told that it was a good corn and grain farm. After the farm had been examined by Klag, his son-in-law and step-son, all of the parties returned to the town of Walnut and went to the office of Stiver, an attorney, where a contract was drawn and signed by Klag providing for the trade by Klag of his Ohio and Texas farms with Gross for the Lee and Bureau County farms, Klag to pay the difference in value either in cash or mortgages.

Klag agreed to take the Lee County land at a valuation of \$40,000.00, and the Bureau County on the basis of \$52,000.00. Klag to convey to Gross, the Ohio land at a valuation of \$37,500.00, and the Texas farm at a valuation of \$8000.00, and to pay the difference in cash and mortgages. Both the Ohio and Texas farms were subject to mortgages which Gross assumed and agreed to pay. The Bureau

County land was subject to a mortgage of \$16,000.00, which Klag assumed and agreed to pay. The conveyances were made as of March 1, 1920. In closing the transaction, Klag gave appellant a mortgage on the Lee County land for \$12,500.00 and on the Bureau County land, the \$8000.00 trust deed in question. At the time of this transaction lands were at the peak of inflated prices.

Klag was desirous of purchasing Illinois land. He and Gross had never met and were entire strangers. Tolpaski, the son-in-law of Klag had learned through parties at Streator, Illinois, that Gross had land for sale and that Klag had arranged to meet Gross and examine lands in question. Because of the slump of the value in land, Klag deemed it advisable to sell his Lee County farm. In May, 1921, he sold the Lee County farm to appellant for \$16,000.00. Gross, appellant, assumed the mortgage thereon^{of} of \$12,500.00 and surrendered to Klag notes 1 and 2 of the \$8000.00 loan secured by the trust deed, sought to be foreclosed in this proceeding with interest on all the notes to March 1, 1922, and paid him the difference in cash. Thereafter Klag failed to pay the interest, the remaining \$4000.00, of said \$8000.00, loan. From the time of the exchange of said lands up until the bill to foreclose was filed, Klag had never made any complaint of any fraud or misrepresentation. He had never complained of alkali in land; that the land was not well tiled or that the overflow was in excess of the amount represented. No such complaint was made either in writing or otherwise. The first time such complaint was made, was in the filing of the answer by Klag.

The evidence is very voluminous. There is much testimony in the record bearing upon the question as to what was said and done by the respective parties at the time of the examination of the land of appellant that was disposed of to appellee Klag.

We do not deem it necessary, in view of the conclusion we have reached in this cause, to set out in full all of the testimony of the respective witnesses. Klag was desirous of purchasing a farm. He went onto the farm, not only himself, but took with him two members of his family for the purpose of making an examination. He went on the farm in question at the time when the crops were growing and at a very opportune time of the year for the examination.

and agreed to pay. The conveyance was made

also. In closing the transaction, King gave a check for \$100.00

on the 10th day of June 1931 for \$12,500.00 and on the 10th day of

the \$2000.00 bond was paid in full. At the time of

for lands were at the time of the sale of the

King was desirous of purchasing the lands. He was

had never met and was not acquainted with King. He was

law of law had learned through a friend

Gross had land for sale and that King had expressed an interest

and examine lands in question. Because of the fact that King

to King, the same is offered in evidence to show that King

May, 1931, he sold the 100 acre tract to King for \$12,500.00

King, a check for \$12,500.00 and on the 10th day of

summarized to King for \$12,500.00 and on the 10th day of

the tract was, except as to the balance in cash

interest on all the notes to which I, the undersigned, was

and it was agreed that the same should be paid to King

within 30 days of the date of this agreement, to wit: \$12,500.00

and any of said lands up until the date of foreclosure was

the same was to be paid to King for the same

he had never complained of King in any way; that the

will filed in the court of the county of the State of

number. The same was filed in the court of the State of

The first time such complaint was made, was in the month of

answer by King.

The evidence is very voluminous. There is such testimony

and some bearing upon the question as to what was said and

by the responsive parties at the time of the execution of the

last of appellant that was disposed of by the appellant King.

It is not deemed necessary, in view of the conclusion to have

reached in this case, to set out in full all of the testimony

of the responsive parties. The same is offered in evidence to

show that King was not a party to the same and that the

same was not a party to the same and that the same was not

part of a very extensive list of the same and that the same

of the farm and its crop-growing capacity. He was there for the purpose of making an examination of the soil and determining whether or not he would purchase.

He testified that on examination of the soil he was able to determine its character; he was told that there was overflow; he was informed that there was alkali; made no investigation to determine the number of acres overflowed; he made no examination to determine the quantity of alkali or where the alkali land laid. He was told that there was tile on the land; he made no examination nor inquired how many lines of tile, how many laterals. He was given fair warning as to all these matters. The mere fact that there may have been more acres overflowed than Cross told him he was advised there was, is not sufficient to warrant the court to refuse to foreclose the mortgage. Hag had an opportunity afforded him of examining the land. He was a farmer, was on the land and was warned of the overflow and of the alkali. Can he now say that he relied upon representations made, and that he was thereby defrauded? He can not shut his eyes and rely upon the alleged representation made.

In viewing the premises with a view of making a purchase of land for farming purposes and when he did so, and being in possession of the information as the record discloses he did possess, is he now in a position to say that a fraud was practiced upon him.

Husted vs Gerny 321 Ill 354, was a suit to set aside a deed on the ground of fraud and misrepresentation in exchange of property, and at page 359, the court among other things said: "Though representations made in the sale of property be not true, if the purchaser has an opportunity to view the property it is his duty to make use of that opportunity. ~~xxxxxx~~ The law charges him with knowledge which he might have obtained by making use of the means afforded him, and where he does not rely upon statements concerning the value of the property and its character, but goes upon the land and examines it relying upon no one's representation as to what it is, it can not be said that misrepresentation though made, affords a basis for relief in equity for the reason that they were not relied upon and unless they be concerning matters which the prospective purchaser cannot readily determine upon examination, he will be held to have exercised his own judgment rather than to have relied upon the statement of the seller."



Even if false statements were made they do not amount to fraud unless the party making them knows them to be untrue and used some measure to deceive or circumvent the other party. St. L. & S.W. Railway Company vs Rice, 85 Ill 406.

It is only in cases where the parties have not equal knowledge or means of knowledge as to the value of property involved in an exchange of real estate that equity will afford relief on the ground of fraud and misrepresentation, and where no deceit has been practised which ~~ordinarily~~ ordinary prudence could not detect the law will not assist a man capable of taking care of his own interests because he makes a bad or losing mortgage. Johnson vs Miller 299 Ill 276.

Cases in which gross inadequacy of price has been held to justify equitable interference with a conveyance of real property are not applicable in a suit to set aside an exchange of properties where the complainant fails to prove his allegations of fraud and deceit and where he had an opportunity to, and did inspect the land, concerning the value of which he alleges he was misinformed. Johnson vs Miller, Supra.

Representations as to the value of property though exaggerated are not ordinarily ground for setting aside a contract and are never made the basis for relief where a party claimed to have been deceived had ample opportunity to know of the truth or falsity of the representation. Johnson vs Miller, Supra.

A person who is induced to part with his property on a fraudulent contract, on discovering the fraud may avoid the contract and claim a return of what has been advanced upon it. He has his election to affirm or disaffirm the contract. But if he would disaffirm it, he must do so at the earliest practicable moment after discovery of the fraud. Hall vs Fullerton 69 Ill, 448.

The answer of Klag alleges that "after the consummation of the contract he learned that all of the statements with reference to the tile in the Bureau County farm, the overflowing, the standing water thereon, the thistles, the alkali, the character of the soil, and the production of grain and corn were false, fraudulent and untrue and made for the purpose of defrauding and cheating the defendants, and that the Bureau County farm was not well tiled, did not have strings of drainage tile 20 rods apart; that it overflowed repeatedly and that water stood on the top of the ground

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that in large quantities during large parts of every year; that there were Canada thistles and thistles on said farm, and over nearly every part of it; that said land was nearly all covered with alkali, so that it affected the land and destroyed its crops-producing quality, and that the farm would not produce good grain and corn and was not the best farm of corn and grain in Bureau County."

These lands were exchanged in September 1859, and one of the parties sought to avoid the contract on the ground of fraudulent representations as to the locality, value, etc., of the land taken by them and it appears that he learned of the falsity of the representation within the year after the exchange and that he never expressed any dissatisfaction or attempted to rescind the contract until the day before filing his bill which was on January 24, 1865, held that owing to the unreasonable delay in filing his bill it was properly dismissed. Hall vs Fullerton, Supra.

The record in this cause shows that the bill to foreclose the trust deed was filed May 2, 1923. The conveyances in the exchange of the lands were on March 1, 1920.

Furthermore, a misrepresentation to constitute fraud to authorize equity to rescind a contract on account of such misrepresentation must contain the following elements: (1) its form must be a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; (6) the statement must be material. Kronkowski vs Knapp, 268 Ill. 133-190; Prentice vs. Crane 234 Ill. 302-307-308.

We are not prepared to say from what is disclosed in this record, that appellees have brought themselves within the rule above announced. Moreover, Klag having gone in person and viewed the premises and took his son-in-law and ~~step~~ son, who were farmers, with him was evidently, when the trade was consummated, relying upon the view of the premises instead of what was said by appellant or his agent. Appellee cannot rely on his judgment and at the same time insist he was overreached. He was willing to dispose of a part of the premises and did dispose of the Lee

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However, the witness was not able to see.

and he was not able to see.

But, because the witness was not able to see, the witness was not able to see.

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County farm and paid one-half of the mortgage indebtedness he is now trying to defeat.

From the state of the record, we are of the opinion, that the decree of the Circuit Court, based upon the findings of the Master is not well founded and that the same should be reversed and the cause remanded to enter a decree of foreclosure in favor of appellant.

Reversed and Remanded with directions.

STATE OF ILLINOIS, }
 } ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



General No. 8243

Agenda No. 43

OCTOBER TERM, A. D. 1928

Re: The People of the State of Illinois, Defendant in
Error.

vs.

Charles Freitag, Plaintiff in Error

Error to County Court, Scott County

NIEHAUS, PJ.

The plaintiff in error, Charles Freitag was found guilty in the county court of Scott county by the verdict of a jury on the first and second counts of an information charging him with unlawful possession of intoxicating liquor in violation of the Prohibition Act; and was sentenced by the court to pay a fine of \$300.00 under the first count of the information; and as a punishment for the offense of which he was convicted under the second count was sentenced to serve a term of six months at the Illinois State Farm at Vandalia. A writ of error is prosecuted to reverse the judgment.

Various errors are assigned for reversal of the judgment. The first error urged is that "the court erred in overruling the motion to quash the first and second counts of the information; being the counts for the possession and on which the verdict of guilty was found and the judgment rendered." It is sufficient to say concerning this contention that the

counts contain the necessary elements which constitute the offense charged; **People v. Talbot** 322 Ill. 416; **People v. Duchow** 331 Ill. 636.

Another assignment of error which is urged as a ground for reversal of the judgment is: "That a written motion was filed to suppress and impound the evidence obtained under a search warrant for the reason that the same was not obtained under proper search warrant, and that it did not properly describe the premises to be searched, the things to be searched for, and the person to be seized and arrested, and held that the true facts of the affidavit would be tried when the case was tried." As to the sufficiency of the motion to suppress and impound the evidence obtained under the search warrant in question, and the affidavit filed in connection therewith, it must be pointed out, that this court is unable to determine the merits of this contention, or to review the action of the court, because neither the motion nor the affidavit filed in support thereof, are set forth in the abstract; and that therefore this question is not before us for review. **People v. Marshall** 309 Ill. 122; **People v. Haywood** 321 Ill. 380; **People v. Mayhue** 228 Ill. App. 186. Attention should also be called in connection with the above assignment of error, to the fact, that neither the search

warrant nor the affidavit for procuring its issuance, is set forth in the abstract; and we must assume therefore that the matters presented to the county court to raise the questions of legal insufficiency of the affidavit and search warrant were properly decided by the court. And the point made concerning the application for change of venue is in the same category as the contention just referred to, and for the same reason is not a proper subject for review by this court.

It is contended, that the court erred, because it assessed two penalties for the same offense; and counsel cite the case of **People v. Martin** 245 Ill. App. 282 to sustain their contention. It is apparent however, that the case cited is not in point with reference to the convictions here involved. In the Martin case, the court as a penalty for the conviction of possessing intoxicating liquor in violation of the Prohibition Act fixed both fine and imprisonment which was not in conformity with the penal provisions of the Act; the Act provides for the fixing either a fine or imprisonment for the offense involved in the Martin case. In this case however, the defendant was found guilty for two separate and distinct offenses, and on two separate and distinct counts of the information; and the court fixed the fine as a penalty for the violation embodied in one count; and

fixed imprisonment as provided by the statute, as the penalty for the violation charged in the other count; this clearly did not constitute a double punishment for the same offense.

It is argued, that the only evidence of illegal possession of intoxicating liquor rested upon the evidence procured by means of the search warrant, which constituted but one act of possession, and that therefore the plaintiff in error was convicted twice under the two counts of the information for the one act of illegal possession. Concerning acts of ^{ILLEGAL} possession prior to the issuance of the ~~SEARCH~~ ^{SEARCH} warrant, there is evidence in the testimony of several witnesses which was legally sufficient to warrant the jury in reaching the conclusion that the defendant had intoxicating liquors in his possession for the purposes of making sale thereof and in violation of the Prohibition Act at the time the ~~search~~ search warrant was issued. And it is evident that the jury were satisfied beyond a reasonable doubt of the guilt of the plaintiff in error, and were fully justified from the evidence in finding him guilty under both counts of the information; and the judgment of conviction and sentence should therefore be affirmed. **People v. Finley** 332 Ill. 40.

A question is raised concerning the competency of certain evidence which the court admitted, namely, that many

people and a large number of callers visited the house of the plaintiff in error. The witness Merle Stice was asked the following question to which objection was made: "Q. State what if anything you observed, Mr. Stice, about callers at Freitag's house within six months before his arrest? A. Well there was a good deal of callers—cars of different kinds—nights—specially when there was a dance down here on Friday night—there would be a great many cars down there. There would be more callers come out than any other time. There might be twelve or fifteen cars—might be. Then they stayed fifteen or twenty minutes—something like that." This evidence was competent and properly submitted to the jury; it constituted a circumstance which the jury had a right to consider in connection with the other evidence in the case, upon the question of the guilt of the defendant on charges against him in the information for possession of intoxicating liquor for the purpose of illegal sales thereof. Complaint is also made about the following question which was put to the witness Emma Little: "Q. Mrs. Little, what if anything did you observe as to the character of the men who came to Freitag's just before his arrest?" The Court: Fix the time exact. "Q. Well Mrs. Little, say in the month of June or May or April, just before Mr. Freitag's arrest in July; what, if anything, had you observed as to the character of the men who

frequented Mr. Freitag's place, as to whether or not they used intoxicating liquor or not? A. Yes I think most of them were." Both the question and the answer were clearly incompetent. The motion of the plaintiff in error to strike out this evidence should have been sustained; but we do not regard this error as reversible in view of the proof made by the people tending to show the guilt of the plaintiff in error of the charges of which he was convicted.

For the reasons stated the judgment is therefore affirmed.

Judgment affirmed.

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254 I.A. 623³

General Number 8246

Agenda No. 8

OCTOBER TERM, A. D. 1928

The People of the State of Illinois, Defendant in Error,
vs.

Roy Z McKown, Plaintiff in Error

Error to the Circuit Court of Sangamon County
ELDREDGE, J.

At the May Term, 1927, of the Circuit Court of Sangamon County, the grand jury returned an indictment against Roy Z. McKown, plaintiff in error, charging him, as an officer and president of the North Side State Bank of Springfield, Illinois, with having received from one John F. Casper, eighty dollars in money, the said Casper not then and there being indebted to the Bank, and the Bank being then and there insolvent whereof the defendant had knowledge and whereby said money was lost to said Casper. The jury found the defendant guilty and fixed his punishment at a fine of \$160.00 and imprisonment in the state penitentiary. The defendant did not testify on the trial and offered no evidence in his own defense except character witnesses and testimony showing that some of his wife's relatives had turned over to a trustee certain property for the benefit of the Bank.

The indictment in this case is based upon section 1 of "An Act for the protection of Bank Depositors," as amended in 1903 (Smith-Hurd Ill. Rev. Stat. 1927, P. 928.) which provides as follows: "that if any bank * * doing a banking business, or any officer of any banking company, or incorporated bank, doing business in this State, shall receive from any person * * not indebted to said bank, * * or incorporated bank, any money * * when at the time of receiving such deposit, said banker, * * or incorporated bank is in his or its knowledge insolvent, whereby the deposit so made shall be lost to the depositor, said banker * * or officer, so receiving such deposit, shall be deemed guilty of embezzlement, etc."

It is first urged that the proof fails to show that the North Side State Bank was insolvent when the deposit was made and that the defendant knew of its insolvency. It appears from the evidence that in February, 1927, the Bank was embarrassed for ready cash; that on or about February 28, 1927, the defendant, who was the president of the Bank, and Cooney, the cashier, went to the office of the State Auditor and had a conversation with the chief bank examiner. The evidence in regard to this conversation is very meager and is given by Cooney. On direct examination he testified as follows: "Shortly before this Mr. Kown

and I were over to the Banking Department of the State House to see someone in charge of that department. Mr. McKown and I had talked about the matter before we went over. I think we went over on Wednesday morning along about the 28th or 29th of February. We talked to E. E. Nicholson, chief bank examiner. We went over the affairs of the bank there and Mr. McKown asked him if he wouldn't let him go to Chicago and Mr. Nicholson said 'yes.' Mr. McKown wanted to go to Chicago to raise some money to use for the bank." On cross examination he testified as follows: "The second of March was on Wednesday. I think it was on Monday or Saturday that Mr. McKown and I went to the auditor's office, but I couldn't say which of those days. We both talked to Mr. Nicholson and Mr. McKown told Mr. Nicholson that he wanted to go to Chicago and see if he could raise some money. He told Mr. Nicholson there had been a gradual withdrawal of deposits from the bank and he thought he could raise money in Chicago, and the auditor consented that he should go up there and see what he could do." Mr. Nicholson was not called as a witness and no witness testified in regard to this conversation except Cooney. McKown went to Chicago and made arrangements to keep in touch with Cooney by telephone in regard to the Bank while he was there and Cooney informed him, over the

telephone, on March 1st that the Bank was getting along all right. On March 2nd, when defendant called Cooney on the telephone to inquire as to how the Bank was getting along, he was informed by the latter that there had been a run on the Bank and that Mr. Jaeger, a bank examiner, had taken charge thereof. It further appears that on March 1st, there had been deposits in the Bank to the amount of \$32,806.65 and that there had been checked out on that day \$44,596.04, so that on that day there had been \$11,789.30 more cash paid out than was taken in. The deposits on March 2nd, amounted to \$4,794.00 and the withdrawals \$10,276.99, the difference being \$5,482.99. It thus appears that on the last two days that the Bank was in operation there was withdrawn from the Bank \$17,272.29 more than was deposited therein. On March 2nd, during the run on the Bank when the cash money had been reduced to the amount of \$2,403.02, Cooney, the cashier, closed the Bank and notified the State Auditor who immediately sent Mr. Jaeger, a bank examiner, to take charge thereof. The last examination of the Bank made by the State Auditor prior thereto was August 8, 1926, and the last report made by the Bank to the State Auditor was on December 31, 1926. Neither the results of this examination nor the report was introduced in evidence and there is no evidence whatever of what the condition of the Bank was on either of these days.

On March 2, 1921, when Jaeger took possession of the Bank, the resources and liabilities thereof were as follows:

Resources:	
Loans and discounts	\$530,938.82
Bonds and securities	4,700.00
Banking house (real estate)	29,976.51
Furniture and fixtures	10,556.47
Other real estate	2,395.09
Due from Illinois National Bank of Springfield	636.83
Due from National City Bank of St. Louis	1,352.61
Due from Ridgely Farmers State Bank of Springfield	210.84
Remittances in transit	353.85
Cash	46,088.33
Over and short account	12.34
	<hr/>
	\$627,211.69
Liabilities	
Capital Stock	\$100,000.00
Surplus	20,000.00
Undivided profits	1,285.47
Time certificates of deposit	65,150.00
Demand deposits	196,422.98
Certified checks	125.00
Savings deposits	128,317.49
Christmas Savings deposits	6,873.12
Due Jefferson State Bank	14,845.70
Due Marbold State Bank of Greenview ..	9,294.35
Due Springfield Marine Bank	11,097.58
Bills payable	73,800.00
	<hr/>
	\$627,211.69

Jaeger testified that the books of the bank showed that on September 18, 1926, the Marbold State Bank of Greenview, one of the correspondents of the North Side State Bank, received a credit for \$33,000.00 and that the bills receivable were charged with the like amount, said charge being made in three items, to wit: \$18,000.00, \$10,000.00 and \$5,000.00; that McKown, the defendant, told him that the \$18,000.00 item represented a note of Roy T.

Jefferson, which note he claimed to have used as collateral at the Springfield Marine Bank for a personal loan that the \$10,000.00 item was a note executed by E. L. Goldsberry, which was not taken into the assets of the Bank at that time but was turned over to the examiner three days after the Bank closed; that the \$5,000.00 item was a note of one O. A. Snodgrass, which was turned over to the examiner three days after the Bank was closed. Cooney testified in regard to these items that the three notes, above mentioned, were supposed to have been transferred to the Marbold State Bank and that if the charge of \$33,000.00 had been made on the other side of the ledger it would show that the North Side State Bank was credited with that money; that after the Bank was closed Jaeger and he found out that the \$18,000.00 item was the Jefferson note, the \$10,000.00 item the Goldsberry note, and the \$5,000.00 item was the Snodgrass note and that these notes were never within the files, property or possession of the North Side State Bank. Jaeger further testified that he continued in charge of the Bank from March 2nd to March 25th, 1927, when he personally turned over all the Bank matters to Oscar Putting, who had been appointed receiver. Mr. Putting testified that these notes were turned over to him by Mr. Jaeger and that he still has them

in his possession. There isn't a word of evidence as to whether these notes are good or bad. The notes themselves were not introduced in evidence. There is nothing to show even to whom they are payable or when they become due. There is no evidence that any attempt has been made to collect them. The evidence shows that they are now in the hands of the receiver as assets of the Bank. It is assumed by counsel for the People that they are worthless without any evidence of any kind to sustain that assumption.

Jaeger testified that the records of the Bank showed that on the close of business March 2nd, there was a cash account of \$46,088.33 and that of this amount there was but \$2,403.02 in actual currency and the balance was made up of cash items totaling \$39,148.96 and that these cash items are listed in detail in his report. None of the books of the Bank were introduced in evidence nor was Jaeger's report introduced in evidence. He does not testify anything in regard to what these cash items were, but it is evident that he is in error in his totals in this regard for the reason that the amount of the actual cash on hand and the cash items testified to would not make the sum of \$46,088.33, but there would be a deficiency of \$4,536.35 in the cash account.

There is no mention of this and no explanation given of any kind. Cooney testifies that these cash items were as follows: a debit ticket of R. W. Hilmer, signed by McKown, for \$2,037.28, which had been filed in court in a voluntary bankruptcy proceeding and on which the Bank took judgment on a car of Hilmer, and at the present time that item has not been paid in full. How much has been paid on the item is not disclosed. He further testifies that among these items is a check signed "Interest account" by McKown for \$257.06, dated February 24, 1927, which has not been paid; a check signed by McKown, marked "Interest account" payable to Springfield Marine Bank for \$379.33, dated February 4, 1927, not paid; a memorandum signed "McKown receipting for cash received on February 5, 1927 for \$355.00"; a receipt of the People's Market for \$127.37, not paid; an item of a note signed by R. F. Ensigner, dated December 24-26, secured by U. S. Adjustment Service Compensation Certificate for \$125.00, not paid; an item signed "F. C. Evans" for \$250.00, not paid; 200 shares of stock of General Industries Corporation of America, issued to F. C. Evans and assigned in blank and listed under the valuation of \$19,382.73; a note signed by F. C. Evans, dated January 29, 1927, due May 29, 1927, secured by 200 shares of stock of the

General Industries of America for \$15,000.00; a check signed by McKown, drawn on the First State Trust and Savings Bank for \$10,000.00, dated August 31, 1926, not paid; a check signed by the Differential Clock Manufacturing Company dated December 8, 1926, for the sum of \$400.00; that company had an account at the Bank but this check was not charged up against its account in the regular course of business; another check for the same amount signed by the same company, dated December 4, not paid; a check signed by McKown, dated September 29, 1926, payable to Illinois National Bank, marked "Farm Account" for \$375.00, not paid; a check signed by McKown, dated December 31, 1926, payable to Troxell Kikendall Company for \$661.29, not paid; a check signed by McKown, dated December 31, 1926, payable to Illinois National Bank for \$375.00, not paid; a check signed by McKown, dated October 5, 1926, payable to the Marine Bank for \$200.00, not paid; a check signed by McKown, dated November 10, 1926, payable to Springfield Marine Bank for \$185.83; check signed by McKown, dated August 28, 1926, payable to "The Bank" for the sum of \$224.98; a check signed by McKown "Interest account" payable to the Marine Bank for \$349.25; a check dated November 30, 1926, to the same bank, marked "Interest account" for \$166.67; a check signed by McKown, dated November 10, 1926, payable to the Marine

Bank, "Interest account" for \$381.00; a check dated September 22, 1926, "Interest account" \$327.50; a debit ticket to Jefferson Printing Co., signed by McKown, dated September 11, 1926, for \$1450.50, not paid; a debit ticket to Tuxhorn Garage, dated August 2, 1926, signed by McKown for \$500.00; a slip dated January 28, 1927, signed by McKown for \$100.00; a slip dated January 17, 1927, signed by McKown for \$500.00; a check dated October 25, 1926, signed by A. M. Hilmer payable to E. M. Major, trustee, for \$900, not paid.

Cooney further testified that the 200 shares of stock of the General Industries Corporation of America, issued to F. C. Evans and assigned by him in blank, were listed under a valuation of \$19,382.73 and carried as cash. He also testified that these 200 shares of stock were put in place of these cash items and he further testifies that the note, signed by F. C. Evans for \$15,000.00, was secured by 200 shares of the same stock. It is hard to reconcile this testimony. A literal reading of it from the abstract would show that there were at least 400 shares of the stock of this company, 200 shares being listed as a cash item and carried as such or used in place of the cash items mentioned and also 200 shares held as security for the note of F. C. Evans

for \$15,000.00. Putting testified that he received from Jaeger an item of certificates for 200 shares of stock of the General Industries Corporation of America listed at \$19,382.00. He further testified that he has not collected anything on said stock and that he has been unable to locate the said F. C. Evans. There is no evidence of any kind in regard to the value of this stock, if it had any value, on March 2, 1927. There is no evidence of any kind as to whether said Evans is solvent or insolvent. It is assumed by counsel for the People that because the receiver has not as yet collected the Evans' note for \$15,000.00 and has not realized anything on the said stock that it and also Evan's note are therefore worthless and were worthless on March 2nd.

Among the above mentioned items the evidence shows that the Hilmer debit ticket for \$2037.28 has not been paid in full. There is no evidence as to how much is still due on this item. The evidence shows that the item in regard to the People's Market for \$127.37 was paid. There is no evidence of any kind as to whether the Ensinger note for \$125.00 is good or bad or whether there has been any effort made to collect it. As above stated, there is no evidence showing whether the Evans' note for \$15,000.00 or the 200 shares of the General Industries Corporation are collectible or not. The evidence shows that the Differential

Clock Company had an account with the Bank but does not show what the balance of that account was on March 2nd. If this account had been sufficient to pay the two checks of this company, each for \$400.00, on that day then they were perfectly good as cash items. Omitting these items last mentioned and including all the others, including the Hilmer check for \$900.00, the total amount of these cash items listed, which the evidence reasonably shows could not be realized upon, is \$17,708.41.

Jaeger testified that the records of the Bank call for notes of a face value of \$530,938.82 and that when he took possession of the Bank on March 2nd there were only notes totaling \$490,730.76, thus leaving a note shortage of \$40,208.16. He further testified that when he asked the defendant, McKown, to explain the shortage the latter told him that he had given a number of these notes to an attorney for collection and would get them and turn them over to him. In a few days he turned over to Jaeger additional notes of the face value of \$23,958.40 which leaves an apparent shortage in the amount of the notes of \$16,249.76. Jaeger testified that the note shortage was "\$10,000.00 or over." The receiver does not testify anything in regard to the amount or value of the notes turned over to him

by Jaeger or anybody else, and there was no other testimony on the subject of this shortage.

Jaeger testified that the records of the Bank showed there should be bonds to the amount of \$4,700 and that he only found bonds to the amount of \$1200, thus leaving an apparent shortage in the bond account of \$3500.00. The receiver does not testify as to what amount of bonds have come into his possession nor is there any other testimony on this subject.

Jaeger testified that when he took possession of the Bank he found that the defendant had overdrawn his checking account in the amount of \$4,361.05. He also found that the defendant had borrowed from the Bank the sum of \$17,964.18, evidenced by two notes, one for \$16,200.00 and the second for \$1,764.18. He further testified that with the first note there was collateral of \$100.00 in Liberty Bonds and \$600.00 in shares in the Elliott-Van Brunt Company, making a total of \$700.00 par value of collateral. It seems to be conceded that this collateral was good though there is no evidence upon the subject. This would reduce the indebtedness on these two notes to \$17,264.18. Cooney, however, testifies that the records of the Bank also show that there was deposited as additional col-

lateral for the larger note, stock of the Hoffman Manufacturing Company of the value of \$10,800.00. Neither Cooney nor any other witness testified as to what the actual value of this stock was. The receiver does not mention the matter in his testimony, and was asked nothing in regard thereto. If this stock was good and the receiver has realized or can eventually realize the face value thereon then the defendant's indebtedness upon these notes would be still further reduced to \$6,464.18. It is assumed by counsel for the People that the whole amount of indebtedness evidenced by these notes was lost to the Bank.

The receiver testified that he had paid one dividend of ten percent to the depositors and it is assumed by counsel that this fact is proof that the Bank was insolvent. The receiver did not testify as to how much of the resources he had collected nor how much remained to be collected. There is nothing in the evidence of any witness to show that this is the only dividend which will be paid by the receiver. There is no evidence of how much the receiver has realized from the assets of the Bank nor how much is yet to be realized. There is no evidence of the costs of the liquidation.

It is further urged that the conversation between the defendant and the chief bank examiner, Nicholson, shows that the Bank was insolvent and that the defendant knew that fact. We have quoted the evidence in regard to this conversation in full in the former part of this opinion, and cannot agree with this contention. There is nothing in the conversation as testified to which supports this theory. If the chief bank examiner at that time had any knowledge, obtained through the defendant, that the Bank was insolvent or that the capital stock thereof had become impaired, he should have immediately taken steps to act in accordance with the directions prescribed by statute. Instead of doing so he granted permission to the defendant to go to Chicago in an attempt to raise cash. There is nothing in this conversation with the chief bank examiner that can raise any presumption that the defendant knew the bank was insolvent. In fact this case seems to have been tried more upon presumptions than proofs.

The capital stock of the Bank was \$100,000.00, the surplus \$20,000.00, and the undivided profits \$1285.47, making an amount of \$121,285.47. Before the Bank could have become insolvent its resources must have been depleted to that amount. The actual

loss or depreciation in the resources of the bank, which the proofs show beyond a reasonable doubt, existed March 2, 1927, are as follows: shortage of cash \$17,708.41; shortage in notes \$16,249.76; shortage of bonds \$3500.00; overdrawn account of defendant \$4,361.05; loss on defendant's notes \$6464.18, making a total amount of \$48,283.32. The other losses claimed are all doubtful and are certainly not proven beyond a reasonable doubt. Even if it be conceded that the \$33,000.00 item in the bills receivable is a proper charge and that the \$19,382.73, listed value of the 200 shares of the General Industries Company be valueless, it would only raise this amount of depreciation to \$111,302.05. The burden was upon the prosecution to prove, beyond a reasonable doubt, that the North Side State Bank of Springfield was insolvent on the 2nd day of March, 1927, and that the defendant knew that it was insolvent. In the case of **People v. Clark**, 329 Ill. 104, it is held: "Only in rare instances has there been a prosecution of this kind unless the bank was so hopelessly insolvent that its condition in that regard satisfied every meaning of the term 'Insolvency' beyond question." The Supreme court in that case cites the case of **Ellis v. State**, 138 Wis. 513, and agreed with the Supreme court in that State in holding: "that the limited meaning of the word

“insolvent” applied in the administration of such laws was not the common, popular or general meaning of the term, which suggested merely a substantial deficit of assets to met liabilities; that the lending of all save a comparatively small portion of a bank’s deposits was inherent in the conduct of the banking business and that this condition was recognized by law; that it would be unreasonable to punish criminally, under a statute of the character here invoked, persons engaged in the banking business whenever their competency to pay all depositors in the usual course of business is challenged, regardless of their competency to pay them all ultimately. The court held that the term “insolvent,” as used in such a statute, does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business, but that the term means insolvent in the broad general sense of a deficit of one’s assets in realizable cash available within a reasonable time, treated as an ordinarily prudent person would generally conduct his business under the same or similar circumstances, to pay his liabilities; and that a bank is insolvent, within the meaning of such a statute, when the cash value of its assets realizable in a reasonable time, in case of liquidation by its proprietors, as ordinarily prudent persons would

generally close up their business, is not equal to its liabilities, exclusive of stock liabilities. This definition of the word 'insolvent,' as employed in the connection stated, expresses the common, ordinary meaning of the word, and for that reason must be taken to have been intended by the General Assembly in the enactment of the statute upon which the instant indictment is based."

It may be a fact that the Bank in question in this case was insolvent on the day mentioned, but before the defendant can be convicted of receiving a deposit when the Bank was insolvent with knowledge of its insolvency, the proof must show those facts beyond a reasonable doubt, which, in this case, we hold they fail to do. In a case of this character a defendant cannot be convicted upon opinions, conclusions and presumptions. *People v. Clark, supra.*

It appears, however, from the proofs that the account carried in the Bank was an account with "John F. or Celia Casper," and that each of said persons had a right to draw on said account. The proofs show that John F. Casper, the depositor, was not indebted to the bank, but there was no proof as to whether Celia Casper was so indebted and it is urged that for this reason the prosecution must fail. The statute makes no reference or exceptions to the character of the account in which the money is

deposited but in plain and unequivocal terms describes this element of the offense as any depositor who is not indebted to the bank at the time of the deposit.

It also appears from the evidence that the \$80.00 deposit by Casper on March 2nd, was money delivered to him by his brother for temporary safe keeping and it is contended that for this reason the prosecution must fail. As between Casper and the Bank the money was the property of the former for which the Bank was liable to him and not to his brother and it was immaterial what interest his brother or anybody else might have had in the funds.

No other errors have been presented to this Court for our consideration. The judgment of the Circuit court is reversed and cause remanded.

Reversed and Remanded.

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254 I.A. 6234

General No. 8256

Common Court
April 1929

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Agenda No. 2

JANUARY TERM, A. D. 1929

Frank Swisher, Appellee,

vs.

Frank Willingham, Appellant.

Appeal from Circuit Court, Vermilion County.

ELDREDGE J.

This case was originally brought before a Justice of the Peace and appellee recovered the sum of \$250.00 as his commissions for consummating a trade of properties between appellant and one Keys. An appeal was taken to the Circuit Court of Vermilion County where appellee recovered a like judgment. It appears from the evidence that appellee was a real estate agent at Hoopston, Illinois, and that Keys had listed a farm, situated in Park County, Indiana, with him for sale or trade. Appellant sold automobiles and ran a garage at Hoopston and had also sought the services of appellee to procure a trade or sale of his garage business. Appellee told him of the farm owned by Keys and several trips were made by appellee and appellant to the farm and appellant made several such trips by himself. After negotiating back and forth between the parties for about a year a contract for the trade of the properties was made and executed by them. The contract was drawn up by appellee in his office at Hoopston in the presence of both

Keys and appellant and several others. The contract provided only for an exchange of properties and no cash payments were provided for. It was executed by both Keys and appellant in appellee's office on the day it was drawn up by the latter. About the time that it was executed by the parties appellee said to them, in substance, that he would not charge them the regular commissions but would only charge them \$500.00 and each one could pay one-half of that amount. There is no dispute but what each party agreed to this arrangement, but appellant's defense is that before the contract was executed appellee had told him that because appellant had previously sold several automobiles to appellee at a little over cost price he would collect the commission from Keys and not charge any of it to appellant. Appellee denies that he ever made such a promise to appellant. Appellee and appellant are each more or less corroborated in their respective contentions by other witnesses and on this part of the case it was for the jury to determine what the terms of the contract were.

Appellant complains that the trial court refused two instructions offered by him which contained correct principles of law as applied to the facts in the case. The law embraced in these instructions was covered by other instructions given on be-

half of appellant and there was no error in refusing them.

In order to impeach the testimony of appellant as to the fact that he had previously sold to appellee automobiles at cost price or a little above that price, the court permitted appellee, in rebuttal, to introduce two bills of sales of automobiles purchased by appellee from appellant which showed the consideration paid therefor. No evidence was given by appellant on the trial to the effect that these bills of sale did not represent the true purchase price of the cars but on the motion for a new trial he filed an affidavit in which he states that they did not represent the true purchase price thereof; that appellant had sold to appellee three cars, the first in 1925, which had a list price of \$972.00 for which plaintiff paid \$725.00, \$500.00 by cash and \$225.00 in trade for an old car; the second in 1926, the list price of which was \$715.00 and for which appellee paid \$600.00; the third which had a list price of \$850.00 for which appellee paid by notes \$525.00 and by commission on a real estate deal \$100.00, making a total of \$625.00. Appellant further states in the affidavit that the bills of sale given by him to appellee and the prices therein named were given for the purpose of determining the amount of insurance and that at the time of the trial he had no opportunity to obtain the information herein contained

as his place of business was twenty-five or thirty miles from the court house and that it was impossible for him to leave the trial and go to his place of business and make the necessary search among his papers and files to find the original invoices in order to prove the price paid for each car and that he did not remember the facts and details as to each sale to appellee. The only defense that appellant interposed at the trial was that appellee told him he would not charge any commission for bringing about the trade in question because he had previously sold to appellee cars at less than the list price and he should have been prepared to produce his evidence on the trial in support of that defense. The case had been tried once before the Justice of the Peace so he must have known what the issues would be. Moreover he made no request to the court for a reasonable time to produce these invoices. A trial court will always grant a reasonable time to a party to a suit to produce evidence which might become necessary to his interests, especially if the necessity therefore could not have been reasonably foreseen before the trial.

In the course of the trial it developed that the contract was never carried out by the parties and appellant testified that the reason it was not consummated was because Keys could not raise

the money. On cross examination counsel for appellee asked appellant if there was any provision in the contract for Keys to pay any cash and it is urged that this was not proper cross examination as the contract spoke for itself. Keys was a witness for appellee. On re-direct examination counsel for appellee asked him this question: "Did you ever have any trouble of any kind with him except in reference to carrying out his contract?" The witness started to answer as follows: "Nothing but trouble since I started—" At this point counsel for appellant made an objection which was sustained. It is urged that the asking of this question was also prejudicial to appellant's interests. In each of the instances mentioned above, if any error existed it was too trivial to cause a reversal of the judgment.

There is no reversible error in the record and the judgment of the Circuit Court is affirmed.

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254 I.A. 624
General No. 8275

Agenda No. 5

JANUARY TERM, A. D. 1929

John M. Prief, Appellant.

vs.

A. H. Hillemeyer, et al., Appellee

Appeal from Circuit Court, Mason County

ELDREDGE, J.

On August 5, 1927, the Boye Needle Company recovered a judgment against John M. Prief before a Justice of the Peace for the sum of \$80.08. On July 28, 1927, the Landes-Man-Hirscheimer Company procured a similar judgment for the sum of \$60.21. On July 30, 1927, the Eggers Fox Company also procured a similar judgment against Prief for the sum of \$182.19. Executions were issued upon these judgments, placed in the hands of a constable and demands made for their payment. The judgment creditors were represented by an attorney, Mr. Jesse Heylin. Subsequently on the fifteenth day of August, A. D. 1927, Prief executed an assignment for the benefit of his creditors as follows:

“State of Illinois,)

Mason County.) ss.

Assignment for Benefit of Creditors.

Now come John M. Prief of the City of Havana, County of Mason, State of Illinois, and under his hand and seal this day does assign, make over, convey and quitclaim to Carl G. Krebaum, as assignee, all his right, title and interest in and to all personal chattels, choses in action, real estate and all other property of whatever kind or character of which he is possessed for the use and benefit of his creditors generally. Said assets herein assigned, whether real

or personal, to be reduced to cash and distributed pro rata to all creditors whose claims are properly filed and probated with said assignee, and I hereby authorize the said Carl G. Krebaum, as my assignee, to make all contracts, bills of sale, deeds of conveyance and all other instruments necessary to carry out and make effective this assignment.

Given under my hand and seal this 15th day of August, A. D. 1927.

John M. Prief, (Seal)''

Krebaum, the assignee, took possession of the property mentioned in the assignment, which consisted of a stock of dry goods, and subsequently sold the same at public sale at which they were purchased by Prief for the sum of \$3360.00. The claims of the merchandise creditors of Prief amounted to about \$3800.00, while, what is called in the evidence, the family indebtedness, claimed to have been owing to the wife and father of Prief, amounted to about \$18,000.00. The merchandise creditors including the three judgment creditors hereinabove mentioned, received a small dividend from the assignee after paying the costs of the administration. The dividends received by the three judgment creditors mentioned were applied upon their respective judgments and after Prief had purchased the property assigned and had started up in business again these judgment creditors demanded the balance on their judgments; thereupon Prief, who is appellant here, filed his bill with a prayer that the constable be decreed to return the said alias executions issued upon

said judgments against him and that said Justice of the Peace who rendered the judgments and said judgment creditors be decreed to release, satisfy and discharge said judgments and that said Justice of the Peace and said constable be enjoined and restrained from levying said executions or either of them or any other executions issued upon said judgments upon the property of the complainant, etc. The basis of the bill is that said judgment creditors represented by their attorney, Jesse Heylin, and other creditors of complainant proposed to the latter that instead of filing a petition in bankruptcy that he enter into a composition agreement with his creditors by which he should assign all his property to some person as assignee; that said property should be converted into cash by such assignee and, after paying all expenses of converting said property, the balance of the money should be distributed between said creditors **pro rata** in full satisfaction of their respective demands against him; that he executed said assignment for the benefit of his said creditors pursuant to said agreement and which said creditors thereafter confirmed and accepted their **pro rata** share of the proceeds from the sale of the property and assets of complainant with the understanding that the same was to be and was in full settlement, satisfaction and discharge of their respective claims and demands against complainant. The

bill also sets out the sale of the property under the assignment, the payment of the **pro rata** shares of the creditors, the issuance of the alias executions by virtue of the judgments of the three judgment creditors as heretofore stated.

The complainant testified that at a meeting on August 15 at his store he, together with Mr. Niehwitz, who was an attorney representing his father and mother, Mr. Gaw, an attorney representing some of the merchandise creditors and Mr. Heylin, attorney representing the three judgment creditors and Mr. Barnes, an attorney representing complainant were present. He stated to the above parties that he would voluntarily turn over everything which he had if they would agree to it otherwise he would have to file a petition in bankruptcy; that Niehwitz said that the only thing left for him to do, was to voluntarily assign everything over to the creditors or file a petition in bankruptcy; that they all agreed that he should make a common law assignment and that they would notify the other creditors and see whether they could get "with them" and do the best they could until "we learned definitely;" that Mr. Barnes stated that it would be an agreement between all creditors and each would take their **pro rata** share and there would be no "comeback."

Niehwitz, the attorney for complainant's father and mother,

stated that he was at this meeting at which were also present Barnes, representing complainant and Gaw representing some of the merchandise creditors; that he was not positive Heylin was in the store, though his recollection was he saw him outside on the sidewalk; that those present talked about bankruptcy and about a common law assignment in order to save costs; that complainant was particularly persistent in stating that unless this would be in full of all claims he would file a petition in bankruptcy.

Barnes, attorney for complainant, stated that he was present at the meeting in complainant's store and that Heylin was also present and that he said to Heylin, "It is understood then, is it, and agreed, that this is a final settlement made in good faith and there will be no question on the part of anyone of these claims after the settlements are made, I depend upon the honor of you gentlemen here, as the attorneys, that this will be carried out." He does not testify that Heylin made any answer to this question but that he drew a paper from his pocket and handed it over to Krebaum the assignee mentioned therein, and that Barnes repeated again, "If Prief signs this it is understood that this is final for all time to come?"; that each of the attorneys assured him that was the understanding and made in good faith.

Gaw testified that he was present at that meeting, together with complainant, Nichwitz and Barnes, that he does not recall whether Heylin joined in the conversation or not but he had been around just before and just after and thinks he was present at the time; that complainant spoke of the question of the assignment being in full release of all liabilities and asked him what he thought of it and also asked Nichwitz what he thought of it.

Heylin in his testimony states positively that he never agreed that this assignment should be in the nature of a composition settlement between complainant and his creditors and that he had no authority from his clients, the said three judgment creditors, to compromise their claims in any way; that at the commencement of the proceedings he did not know of the so-called family indebtedness, but thought the property would bring enough at a sale to pay all the creditors fifty percent of their claims.

The hearing before the Chancellor resulted in a decree in favor of appellees dismissing the bill for want of equity. In our opinion this decree was proper. There was no positive evidence that Heylin did in fact consent that the assignment should be in full satisfaction and settlement of the claims of his clients, but whether he did or not the bill neither alleges nor is there any proof that he had any authority from his clients to settle their

claims by the alleged composition agreements nor is there any proof that his clients had any knowledge that this assignment was in the nature of a composition agreement or ever ratified it as such. Without proof that he had authority to consent that the assignment should constitute a composition, his clients were not bound thereby.

In the case of **Allison v. Pierson**, 285 Ill. 387, it was held: "There is neither averment nor presumption that the attorney had any authority to compromise the case or accept the money for his client. An attorney is authorized to receive his client's money when he is employed for that purpose and does so by virtue of his retainer. (**Ruckman v. Alwood**, 44 Ill. 183.) Wilson's employment was not to collect money but to set aside the will, and without special authority he was without power to accept money in compromise of the suit." In **Crahe v. Mercantile Savings Bank**, 295 Ill. 375, it is held that an attorney employed to prosecute a suit to judgment has no implied authority to endorse the client's name on a check payable to her order in satisfaction of the judgment. In **Howlett v. Mills**, 22 Ill. 341, in discussing a plea, the court said in reference thereto: "It does not aver that Sears had wasted, sacrificed, or misapplied the fund, or had in any manner been wanting in care and prudence in its management. But it simply relies upon the fact, that by the advice of the creditors, of whom

defendants were a part, the property was surrendered by the assignee into the hands of Sears and that he had reduced it to money. The mere assent by a creditor, that his debtor may make an assignment for the benefit of his creditors, cannot have the effect to release and discharge the debt, and this is what is asserted by this plea.”

Neither under the pleadings nor the proofs is complainant entitled to the relief sought by his bill and the decree of the Circuit Court is affirmed.

Decree affirmed.

Abt.
5a
254 L.A. 624²
General No. 8294

Agenda No. 19

OCTOBER TERM, 1928

Bertha Frantz, Defendant in Error,

vs.

Bruner G. Cox, Plaintiff in Error,

Writ of Error to the Circuit Court of McLean County
SHURTLEFF, J.

This was an action of trespass on the case for personal injuries to the defendant in error which she claimed were caused by the negligence of the plaintiff in error. The original declaration consisted of eight counts and in the first four counts a joint liability was charged against plaintiff in error and his wife, and the fifth, sixth, seventh and eighth counts charged the plaintiff in error alone with negligence. Before trial the first four counts were dismissed and the suit against the wife of defendant in error dismissed. This left the declaration consisting of the fifth, sixth, seventh and eighth counts. The fifth count in the declaration consisted of a charge of general negligence. The sixth count charged a violation of the statute against driving at an excessive speed. The seventh count charged a violation of the statute in failing to pass on the left of the car parked on the side of the paved highway, and the eighth count charged negligence in violation of the statute by charging that plaintiff in error was driving his automobile while drunk and intoxicated. Plea of the general issue was filed by plaintiff in error and a similiter by defendant in error.

The evidence showed that between eleven and eleven-thirty o'clock on the night of January 30, 1927, defendant in error and her husband and two children were returning to their home in

Eureka in a Ford Tudor sedan driven by the husband, and that on account of some trouble with their car they stopped on what was known as the Washington hill, six or seven miles east of Peoria; that their car was parked at the side of the road, the defendant in error claiming within about two and one-half feet of the fence, which was six feet from the edge of the pavement, and the plaintiff in error claiming that the right wheels of the car of the defendant in error were parked about four feet from the fence. On account of the trouble to the car defendant in error and her husband had got out and were standing to the right of the same, next to the fence, and plaintiff in error also coming from Peoria in a Hudson coach ran into the rear of the Ford sedan and knocked it quite a distance along the hard pavement across and to the fence on the other side of the road, turning it completely around so that it was facing west toward Peoria. The husband of defendant in error was thrown about fifteen feet from where his car had been standing to the edge of the pavement and defendant in error was thrown about fifteen feet further to the center of the pavement, was rendered unconscious and when she came to was lying on her back in the middle of the pavement. Plaintiff in error claimed that he did not see the car which he struck until he was about fifteen feet from it and also claimed that the tail light of that car was not burning. Both defendant in error and her husband and another witness stated positively that the tail light was burning; that the pavement was wet and slushy and plaintiff in error claimed the night was misty. Others stated that while it was dark it was not misty.

On account of this accident defendant in error showed that she had a falling of the uterus, and of the pelvic floor; that such falling appeared within ten days after the accident and that she did not have such falling before; that she also had an injury to her back which the doctor located as being on that

part of the spine known as the sacrum and also an injury to the nerves emanating from this bone. This condition of the sacrum and of the nerves still existed on a Saturday previous to the trial when the doctor made the last examination.

On the Saturday night following the collision defendant in error had what she described as a terrible nervous spell, a pain beginning near the end of her spine which shot into her head; she felt dizzy and things blurred and she could not get her breath and felt as though she were dying and as though when your foot goes to sleep and her whole body felt that way even to the finger tips, and she said she really thought she was dying.

The undisputed evidence is that she has had a recurrence of these "nervous spells" at least once a week from that time until the time of the trial, and that at times she has had as many as two in one day, and that she had one on the Sunday night immediately prior to the trial. The evidence showed that this injury to the womb was a permanent injury unless remedied by a major operation and also showed that the injury to the nerves emanating from the sacrum might or might not be permanent; but if this condition was not permanent it would take considerable time to heal. The evidence also showed that it was the opinion of her attending physician that the falling of the womb and giving down of the pelvic floor was caused by the blow which she received when she was thrown upon the hard pavement at the time of the collision.

The evidence also showed that since the accident the defendant in error had not been able to do her own work; that she was not able to wash and not able to sweep and also showed that she had been compelled to have help from the time of the accident until the time of the trial. The evidence also showed that defendant in error had not been able to sleep since the accident.

except by taking bromides prescribed by her physician and that previous to the accident she had always slept easily and well. The evidence also showed that at the time of the accident she was about one month pregnant and that at the end of the ninth month a baby was born under normal conditions.

The evidence showed that plaintiff in error prior to January 30, 1927, had been operated on for an exophthalmic goiter and that he had been out of the hospital six or seven months at the time the accident occurred; that an exophthalmic goiter is an inward goiter pressing on the optic nerves, making the eyes protrude, and that that condition still existed at the time of the accident or collision and affected his nervous system and that sometimes he could not keep it under control; that he was not nervous unless something upset him and that then he did get nervous and that that condition still existed at the time of the trial. The evidence of the plaintiff tended to show that plaintiff in error was intoxicated at the time of the accident. Witnesses testified that they could smell liquor on his breath. This was denied by plaintiff in error, who said that he had not drunk any intoxicating liquor for five years and that the smell of the intoxicating liquor had been caused by alcohol spilling out on the pavement from the radiator of the car of plaintiff in error. On this proposition the trial court refused to give any instructions to the jury in behalf of defendant in error. Plaintiff in error at the close of the evidence for the plaintiff made a motion to instruct the jury to find the defendant not guilty, which was denied, and then made a further motion to instruct the jury to find the defendant not guilty on the eighth count of the declaration and the court at that time reserved his ruling on the question. At the close of all of the evidence plaintiff in error again made a motion to instruct the jury to find for the defendant, which was refused, and

again made his motion to instruct the jury to find the defendant not guilty under the eighth count of the declaration.

The jury returned a verdict against the plaintiff in error for the sum of \$2,250 and after overruling a motion for a new trial judgment was entered for this amount against plaintiff in error and in favor of defendant in error. Plaintiff in error has brought the record to this court, by writ of error, for review.

Plaintiff in error complains that there was no competent testimony offered showing the physical condition of defendant in error prior to the injury. Defendant in error testified that the organs in the pelvic cavity were in a natural position prior to the injury, and plaintiff in error contends that such proof would be competent only in case it came from an expert. There is authority to the contrary: *DeLong v. Chicago Railways Co.*, 187 Ill. App. 432; *North Chicago St. R. R. Co. v. Gillow*, 166 Ill. 444; *North Chicago St. R. R. Co. v. Cook*, 145 Ill. 551.

Plaintiff in error offered the testimony of expert witnesses tending to show that an injury, after a month's pregnancy, sufficient to cause a tipping of the womb would cause a miscarriage, and that the possibility would be accentuated where there was a history of a previous miscarriage. After the injury defendant in error was afflicted with a moderate falling of the womb. She had a relaxed condition of the pelvic floor. There was a disturbance of the organs in that cavity which her physician, Dr. Madison, testified did not exist a year previously and no child birth had intervened. Dr. Madison's testimony corroborates defendant in error's as to her condition prior to the injury. Dr. Madison testified:

"There are various causes for the falling of the womb or the relaxing of the pelvic floor. It can be caused by child

birth; women that have borne many children are more apt or less apt to have falling of the pelvic organs pro-cidentia. It may be due to injuries from instrumental delivery of the body. **It may be due to traumatism.** Traumatism is an external violence of any kind."

Dr. Easton, the principal witness who testified for plaintiff in error, stated that an injury which would traumatize or cause a tipping of the womb of a woman who had a pregnancy of a month "would be almost certain to produce a miscarriage." In his testimony he stated that by traumatize he meant a blow that went into the abdomen in which there might be an injury of the lower part of the abdominal wall, which would hurt or bruise the uterus." It is not claimed that defendant in error was thrown upon the cement pavement, defendant in error was thrown upon the cement pavement, striking upon her back and spine, known as the sacrum, It throws no light upon the subject to cite cases of other injuries that did produce a miscarriage. In some of the cases such was the result; in other, not. The condition of the proof in this regard would not warrant this court in reversing the judgment.

Plaintiff in error assigns error that there was no proof in the record to warrant submitting the eighth count in the declaration of the jury. The eighth count in the declaration charges that said plaintiff in error drove and operated his said car upon said highway while he was drunk and intoxicated, and that "by reason of the negligence and carelessness and wantonness of the said defendant," etc. There were some proofs offered by defendant in error tending to show that plaintiff in error had been drinking, and while it may be true as contended by counsel for plaintiff in error that such proofs did not preponderate, still the count did not charge a willful and wanton injury. The charge in the count amounted to no more than a charge of negligence,

based upon the violation of a statute, and if the proofs establish the other or any of the counts in the declaration we would not be warranted in reversing the judgment upon the ground stated.

Plaintiff in error complains of the giving of the seventh instruction for defendant in error as to the amount and measure of damages, the prelude to which is: "That if you find the defendant guilty as alleged in the declaration or some count thereof, then," etc. It is contended that it was error to refer the jury to the declaration where the instructions do not inform the jury as to the particular charges in the declaration, citing *Kehr v. Snow & Palmer*, 225 Ill. App. 403. In *Kehr v. Snow & Palmer*, supra, this court cited *Bernier v. Illinois Central R. R. Co.* supra. On page 472 the court, citing a similar instruction, holds:

"The court instructs you that if you believe from a preponderance of the evidence that the defendant is guilty as charged in the plaintiff's declaration, then, in determining the amount of damages, if any, to be awarded to the plaintiff as administrator, you should fix such amount for your verdict, as will, in your judgment, from all the evidence be a fair and just compensation to the next of kin of decedent for the pecuniary loss, if any, resulting to them by reason of her death.'

"It is contended that this instruction refers the jury to the declaration to determine the issues and that it is in direct conflict with the instruction hereinbefore quoted, for the reason that that instruction limited recovery to the first count of the declaration and that this instruction authorizes a verdict upon any of the counts of the declaration. We have repeatedly held that the court should not give a peremptory instruction to find for the plaintiff if the jury should find that he had proved his case as alleged in the declaration, and further, that it is the duty of the court to define the issues to the jury without

referring them to the pleadings to ascertain what they are (**Krieger v. Aurora, Elgin and Chicago Railroad Co.**, 242 Ill. 544; **McFarlane v. Chicago City Railway Co.**, 288 Id. 476; **Laughlin v. Hopkinson**, 292 id. 80.) But we do not consider this a peremptory instruction. The instruction does not direct a verdict for the plaintiff, but says, simply, that if the jury find the defendant guilty then they shall award to the plaintiff certain damages. The instruction does not purport to lay down any rule regarding the liability of plaintiff in error, but lays down a rule for the measure of damages in case plaintiff in error is found liable for the death. (**Bonato v. Peabody Coal Co.**, 248 Ill. 422; **Illinois Central Railroad Co. v. Gilbert**, 157 Id. 354.) This instruction is entirely different from that form of instruction which declares 'that if the jury find from the evidence that the plaintiff has made out his case as alleged in the declaration then they should find defendant guilty.' "

In plaintiff in error's instructions fifteen, sixteen and nineteen the same error charged is committed to some extent by referring to "negligence as alleged," "negligence charged by the plaintiff," and "the jury complained of by the plaintiff," etc., so that we conclude the instruction given did not violate the rule stated.

The question of due care and caution on the part of defendant in error and negligence on the part of plaintiff in error were fairly submitted to the jury and for the reasons stated we have found no substantial error in the record that would warrant a reversal of the judgment.

The motion taken with case to tax costs for an additional abstract is denied. The judgment of the Circuit Court of McLean County is affirmed.

Affirmed.

General Number 8299

Agenda No. 18

JANUARY TERM, A. D. 1929

The people of the State of Illinois, ex rel., Marian

Shryack, Appellee,

vs.

Ross Shryack, Appellant.

251 I.A. 624³

Appeal from the County Court of McDonough County
SHURTLEFF, J.

This is a bastardy proceeding in which appellee, Marian Shryack, charges Ross Shryack, appellant, with being the father of her child, which was born on March 29, 1927. There was a proceeding in Justice Court upon a complaint in writing, in which appellant gave bond to appear in the County Court to answer the charge. In the County Court appellant entered a plea of not guilty and there was an issue made up as follows:

"Is the defendant, Ross Shryack, the father of the bastard child of Marian Shryack?" to the form of which issue appellant objected and the cause was tried at the June Term, 1928, of said court. The relatrix is and has been an unmarried person. The alleged occurrence is definitely fixed as having taken place on the evening of July 4th, 1926.

Some of the facts surrounding this case are as follows: There were three Shryack families living on the north side of a public highway running east and west and connecting at its extremities by well established public highways with the city of Macomb, which lay in a southeasterly direction, and the village of Blandinsville, which lay in a northwesterly direction. The home of appellant was about a mile and a quarter east of the home of Milton Shryack, and the home of John Franklin Shryack, called Frank Shryack, was about a quarter of a mile east of the home of appellant. Milton and

appellant were brothers, and their father, Joe Shryack, and their mother, Susan Shryack, were living in Blandinsville. Dan J. Curran and Alice O. Curran, husband and wife, and their two daughters, were living in Macomb.

The family of Milton Shryack consisted of himself and wife and their son Burnette, who was twenty years of age. The family of appellant consisted of himself, his wife Della, his son Fay, and his daughter Ruth. Appellant was living on his father's farm. The family of Frank Shryack consisted of himself, his wife Lorene, his two unmarried daughters, Marian (the relatrix) and Carol, his son Ford, and his married daughter, Dorothy Mesecher, wife of Warren Mesecher. The married daughter and her husband had been living at the home of Frank Shryack for some time prior to July 4, 1926. Dorothy was sick, bedfast, on July 3, 4 and 5, 1926. Frank Shryack was not in good health. Mrs. Curran, Mrs. Ross Shryack and Mrs. Milton Shryack were sisters. Joe Shryack and Frank Shryack were brothers, and appellant, son of Joe, and relatrix, daughter of Frank, were first cousins. There were three Mesecher brothers—Warren, Glenn and Clarence. During the months preceding and following July 4, 1926, Warren Mesecher lived with his wife at the home of Frank Shryack. Glenn and Clarence Mesecher worked upon lands with their brother Warren in the vicinity of the Shryack farms, but neither of them lived in either Shryack home. Warren Mesecher's wife taught school in the spring of 1926 in an adjoining neighborhood and Marian Shryack attended school in Macomb and Warren frequently took his wife and Marian to their respective schools. There is some testimony in the record which is disputed, tending to show that during that summer relatrix was seen in the fields. There was an association between the relatrix and Warren Mesecher, owing to the relationship and living in the same home, and doubtless at times she met Glenn Mesecher. Nothing

further is shown except as will be hereafter set out. The events of Sunday evening, July 4th, as related by appellant, were about as follows: Certain members of each of the three Shryack families living along the east and west highway, and also Mrs. Curran and her two daughters, attended services that evening at the Christian church at Blandinsville. Two cars were required for their accommodation. One of these was appellant's car, which was a Ford touring car not in very good condition. On the day before Milton Shryack had worked on this car at his brother's home, endeavoring to put it in better condition. In going to Blandinsville that evening Fay Shryack drove his father's car and Ruth Shryack and relatrix sat in the front seat, and appellant and others in the back seat. The parties assembled at the home of Joe Shryack at Blandinsville and were there for about an hour and a half and went to church about eight o'clock. The services lasted about an hour, and the parties straggled back until they were all assembled again at the home of Joe Shryack, and left there for their homes at about nine fifteen. In going home appellant and his wife sat in the front seat of his Ford touring car, and the two Curran girls, Laura and Mae, and Fay, Ruth and relatrix crowded into the back seat. There was some trouble on a small hill and Fay Shryack got out and pushed the car. It was claimed there was only one front light on appellant's car that night, the right light being out of commission. Appellant stopped at his brother's so that the Curran girls could get their nightgowns and reached his home at about nine forty-five. The understanding was that the girls were to stay over night at the home of appellant and he left his car in the driveway on the west side of his house and he and his wife went into the house to get the beds ready for the girls.

Relatrix did not get out of the car. Although she testified that she was already in the front seat, the evidence shows that she was in the back seat when the car stopped and then climbed

over into the front seat. After the beds had been made Fay Shryack asked his father to take relatrix home, saying that she had said she wanted to go home. Appellant got in his car and drove east eighty rods to the Frank Shryack home and up into the driveway in the yard, the car then facing northwest, and relatrix got out of the car and thanked him, saying "Good-night," and went into the house. Appellant backed out and drove west to his own home, put the car in the garage, got his pipe and smoked it, and saw and talked to Fay Shryack, Laura Curran and his wife. It was then about ten minutes after ten, and all went to bed.

The relatrix testified that before appellant left his home to take her to her own home, he stated that he was going to Macomb for ice and brought a gunny sack out of his house, or something like a gunny sack, and threw it in the back seat of the car; that as he approached her home he speeded up the car; that she protested, but that he insisted that she go to Macomb with him after the ice; that he drove a mile or a mile and a quarter east of her home, turned and went south to the Thompson College school house, then turned and went east about two or two and one-half miles to the corner west of the Guy church, then turned and went south where there was a little jog in the road, then turned and went west to the second corner of that jog, at which point he turned the car around and went back east a short distance over the same way he had come, stopping the car on the south side of the road about two feet from an embankment next to the fence. She testified that after passing her home nothing was said that she could remember, but that appellant up to the time when he stopped the car in that jog in the road, had not interfered with her in any manner, had not made any passes or anything of that kind of an improper nature, and that there had not been any conversation up to that time with reference to any improper relationship between them.

Her father's family had been friendly and intimate, and she had visited frequently at the home of appellant and his family had visited at her home. According to her testimony, after appellant had stopped the car on that jog in the road he told her to get out a minute, and she asked him why, not having any idea what he meant by asking her to get out. He made no reply. She testified that he climbed over the north side of the car, where there was no door and where the steering wheel was, and went around to the front of the car, at which time she suspected something wrong. She knew how to start and drive the car but did not undertake to do so. He came around to the south side of the car and opened the door and tried to pull her out. She resisted and called for help but there were no houses in that vicinity. After several minutes effort he got her out of the car and tripped her. Her dress was orange colored, medium weight, her underclothing between a step-in and bloomers—a little of both. According to her testimony, she afterwards had black and blue spots on her knees and some on her arms and her dress was torn under her arms and there were some rents in her stockings. She was in the space between the car and the embankment, which was about two feet wide, when he tripped her. She fell on her back right across the bank with her head toward the south and her feet toward the car. She struggled until she was so weak she could not struggle any more, and then lost consciousness. After that she knew nothing of what took place or of what was going on except as she would draw an inference afterwards, and she was in the car going west about half way along the road leading west from the Guy Church when she recovered consciousness. From the time she was tripped and she struggled on the embankment until she was in the car about a mile west of the Guy Church, she had no recollection whatever of what was going on. When she recovered consciousness she was on the front seat and appellant was at the wheel. She did not say

anything to appellant but she testified that after they had turned the corner at the Thompson College school house he said, "Don't say anything about this, because I didn't hurt you." She made no answer and there was not anything more said. When the car reached her home she got out without assistance. He said, "Good night." She did not say anything but went into the house and up to her room. She was then twenty years old, weighed about one hundred forty pounds and her height was five feet six inches or six inches and a half. Appellant then weighed one hundred thirty-seven pounds. Appellant did not go to Macomb for ice.

Appellant testified that he did not drive his car east of the home of Frank Shryack that night, taking relatrix with him, and that he did not go down to the place in the road some miles east and south of Frank Shryack's home where Marian Shryack testified he had sexual intercourse with her, but that he was not there at all that night, and that he did not have sexual intercourse with her at any place that night, or at any other time, but that after driving relatrix home from his house he left her at her home and returned to his own home.

There are various side lights bearing upon the proofs which will be taken up on consideration of the case and the proofs. There was a verdict and judgment in behalf of relatrix, finding that appellant was the father of the child, and the usual orders entered, from which an appeal has brought the record to this court for review.

This cause on either or any finding of a court must result in a tragedy to the actors in its results and history; still, it must be passed upon and determined by the rules of law and the established principles by which only courts are or should be governed. It is a case, especially on the facts, where a court and a jury could receive great light by having the parties and witnesses before them, seeing and hearing them testify and

observing all the tones and gestures which, in many cases, go far to determine the credibility to be accorded the witnesses. We shall first take up the legal errors assigned.

Appellant contends that the form of the issue made up was not in conformity to the statute and only submitted one side of the controversy, as the "or not" was omitted from the form. We can not agree with this contention. It has been held that the complaint and the plea of not guilty constitute the issue and that the statutory requirement that the court make up an issue in a particular form is directory and not mandatory. (*People v. Woodside*, 72 Ill. 407; *People v. Humbracht*, 215 Ill. App. 29.)

It is contended that it was error on the trial of the cause for counsel to ask relatrix: "Who is the father of your child?" that the answer to that question was the ultimate fact to be determined by the jury and that the question and answer invaded the province of the jury. Relatrix on the witness stand had testified to all the facts and circumstances under which she claimed the child was begotten, and had further testified that she had never had intercourse with any other man or at any other time; that it was her only act of sexual intercourse in her life. While the question and answer were objectionable and in their nature tended to invade the province of the jury, under the circumstances of this case we can not see that the effect of the answers of relatrix went further than to assert that the story she had told was true and that the jury could not have been prejudiced by the error, if it was such. It can not cause a reversible error in this cause. It is objected that in the court's instructions as to the form of the verdict, one form of verdict finding the defendant guilty was marked by the court "give," while the other form as to finding the defendant "not guilty" was not so marked. An examination of the record does not warrant the objection.

Relatrix testified that about the first of October 1926, she became engaged to marry Glenn Mesecher. The testimony does not show whether she informed him of her condition or not, or what became of or was the result of the engagement. She was unmarried at the time of the trial in 1928. Relatrix accompanied Glenn Mesecher, together with her sister and Warren Mesecher and another couple in May, 1926, to Dallas City. She went with her married sister and her husband to commencement at Clochester a little after the middle of May. Her recollection is that Glenn did not go with them at that time. She likely saw Glenn Mesecher in the neighborhood at other times.

From her testimony it is to be inferred that she told no one of her condition, not even Mesecher, as her father was an invalid and her sister had been sick, and she seemed to feel that her mother had so many worries that she could not tell her. In the whole record there is not a syllable of testimony in any manner attacking the Mesecher brothers, or a single one of them, or indicating but that they were honest, respectable and highly conscientious; nevertheless, appellant insists that "the testimony of the relatrix that about October 1, 1926, she became engaged to be married to Glenn Mesecher, knowing at the time that she had been pregnant for about three months, but not disclosing that fact to him, is competent evidence as tending to show that Glenn Mesecher knew of her pregnancy and was the father of her unborn child, and that the charge she made against the appellant one month later was without foundation and the result of a conspiracy to falsely accuse the appellant of the paternity of the child. (*Zimmerman v. People*, 117 Ill. App. 54; *People v. Lamberg*, 160 Ill. App. 644.)" This is pure inference. *Zimmerman v. The People*, *supra*, is based upon a case where a third person took the pregnant woman to a home, paid her bills, arranged for her confinement and care; and The

People v. Lamberg is a case where men outside of the defendant testified that they had had intercourse with the relatrix at or about the time of the conception. The rule as to testimony in cases of this kind is laid down in **The People v. Kirk**, 223 Ill. App. 364, where the court say: "Besides that, as we undersand the rule of evidence, two things must concur before such proof is admissible: First, the opportunity, and the second, the disposition to have sexual intercourse together. The proof offered might have shown the opportunity, but there was no proof of the lascivious propensity of any of the men she is said to have been out with after dark; neither is there any proof that the prosecuting witness had any disposition to have promiscuous illicit relation with other men or any other man than the defendant. Under all the circumstances it was not error to exclude the offered testimony."

This record is free from any testimony showing a disposition on the part of Warren Mesecher or Glenn Mesecher to have illicit relations with relatrix or any other person, and there is nothing showing any lascivious tendencies in their conduct. Counsel's inference as drawn that relatrix did not inform Glenn Mesecher of her condition upon the engagement produces a much stronger inference that counsel did not believe it was Glenn's child. Certainly, if it was Glenn's child and appellant was innocent, Glenn and relatrix entered into an infamous conspiracy to fasten it upon her own cousin by blood and a man with a wife and family in the neighborhood. Even simple cunning would have led to a less arduous task.

Warren Mesecher testified for relatrix as to a conversation between appellant and the mother of relatrix about the first of November, 1926. He testified that he first knew of the condition of relatrix about that time. Appellant sought to impeach his testimony and asked him if he did not state to Albert Wilcox in July or August, 1926, "I don't care much for Ross Shryack. I suppose you have heard the talk going about Ross Shryack," and that Wilcox

replied, "No, I have never heard anything against him," and that the witness replied, "you will some time." Witness said the conversation occurred, but not "just that way." Witness admitted that the next spring after the birth of the baby he said in substance to Wilcox: "You remember what I said to you last summer about Ros's Shryack?" and Wilcox, remembering it, the witness said: "Well, that is what I meant." The witness was truthful in his testimony. He was not permitted by relatrix's counsel to give the true version of the talk and appellant did not want it. It does not show in any respect that the witness knew anything about the condition of relatrix in July or August, 1926, and does not impeach the witness. It rather suggests that appellant may have been talked about on some other matter. There was no testimony in the record placing the slightest taint upon the prosecuting witness. It rather shows her to be a young lady of refinement, ambition and eager for an education and to make herself useful to society.

Some complaint is made by appellant as to the instructions. Complaint is made as to instructions P-2, P-3 and P-10. The first two merely advise the jury that it is not a criminal case and that the jury do not have to find the defendant guilty beyond all reasonable doubt; that the evidence must only preponderate in favor of relatrix to find the defendant guilty. Instruction P-10 states the rule as to the preponderance of the evidence and incorporates the words "although but slightly." The court of this State have not urged the instruction in this form, neither have they held it was reversible error. (*Hanchett v. Haas*, 219 Ill. 546; *Chicago City Railway Co. v. Bundy*, 210 id. 39.)

Appellant criticises instruction P-4 which is as follows: "The Court instructs the jury, that when parties to a suit testify, the one affirming, the other denying a fact, then the jury are to determine from the circumstances usually attending such transaction, from

the reasonableness of the testimony, and from all circumstances in evidence bearing upon the issue, in determining the truth of the matter." Appellant argues that the wording of the instruction permits the jury to go outside of the evidence and from the circumstances usually attending such transactions to determine the credibility of the witnesses and the truth of the fact. It has been held that it is no valid objection that the instruction authorized the jury to test the credibility of the witnesses by their knowledge and judgment derived from experience, observation and reflection. **Springfield Railway Co. v. Hoeffner**, 175 Ill. 642; **People ex rel Dunn v. Moore**, 188 Ill. App. 418; **Stout v. Taylor**, 168 Ill. App. 410; and **Gormely v. Hartray**, 105 Ill. App. 625.) We can not believe that the jury could have gathered more than this from the instruction or could have been prejudiced by the instruction.

The instructions complained of in **Johnson v. Fendergast**, 308 Ill. 265; and **Hinckley v. International Company of Am.** 230 Ill. App. 379, were virtually instructions that the jury were permitted to disregard anything which they might regard "as a fine spun rule of law," etc., and the matter as set out in the former cases was not criticised.

Appellant criticises the giving of relatrix's instruction P-5, which is as follows: "The Court instructs the jury that the credibility of the witnesses is a question exclusively for the jury. And the law is that where a number of witnesses testify directly opposite to each other the jury are not bound from that fact alone to consider the weight of the evidence as evenly balanced. The jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent fairness or want of fairness, the reasonableness of their testimony, their means of observation and knowledge, the character of their testimony, whether negative or affirmative, and all matters

and facts and circumstances shown in the evidence bearing upon the question of the weight to be given to their testimony and give to the testimony of each witness such weight as to you it may seem fairly entitled to."

In this instruction no distinction is made between negative and affirmative testimony, yet appellant contends: "The jury without information on the subject would naturally conclude that affirmative testimony is better than negative and that the testimony of the defendant denying the charge made by the relatrix and stating that he did not do so and so, was negative evidence, whereas it was in law just as much affirmative evidence as was the testimony of the relatrix." We do not think the instruction is susceptible to the criticism made. Jurymen are not lawyers and it is only from a recent date that courts have spoken openly about certain classes of negative facts, about which men usually have little concern. We can not believe that this instruction confused any jurymen in this case.

Appellant complains of instruction P-7, which is as follows:

"The jury are instructed that the question whether or not intercourse, if any, between Ross Shryack and Marian Shryack was against the will of Marian Shryack is not material to the issue in this case. If you believe by a preponderance of the evidence that intercourse occurred and the defendant, Ross Shryack, is the father of the bastard child of Marian Shryack, you should return your verdict against the defendant regardless of whether you believe from the evidence that intercourse, if any, between the defendant and Marian Shryack was with or against her will."

It is argued that this instruction is misleading and prejudicial for the reason that if appellant used force it would tend to inflame the minds of the jury, and if the defendant did not use force, if relatrix consented, it would seriously affect

her credibility. Of course, the main question at issue in this case was whether appellant and relatrix had intercourse. Appellant denied that he met her or was with her at the place in question, and has offered much corroborative proof for the purpose of showing and possibly tending to show that neither of them were at the place in question. If the parties were there and had intercourse at the time in question, it would make no material difference to the issues in the case as to just how it was accomplished or the mental attitude of relatrix; still, we know of no rule or law that binds or limits relatrix as to the charge if the complainant states the truth.

Complaint is made as to the giving of instructions P-6 and P-9. The first is as follows: "The Court instructs the jury that, although you may believe from the evidence that the prosecuting witness had sexual intercourse with another person about or near the time her bastard child might have been begotten, still such fact would not warrant the jury in finding the defendant not guilty, if you believe from a preponderance of all the evidence in the case that the defendant is the father of such bastard child."

The second reads: "The Court instructs the jury that if the jury believe from the evidence that the prosecuting witness had intercourse with other persons that fact would not warrant the jury in finding the defendant not guilty, if the jury believe from a preponderance of the evidence that the defendant is the father of the child."

The instructions should not have been given, as there was no testimony in the record other than the condition of relatrix showing that relatrix had had intercourse with any person other than appellant. The instructions were more favorable to appellant than to relatrix and can not be a cause of reversal in this case. Substantially the same instruction was given in *People ex rel Runn v. Moore (Supra)*, 188 Ill. App. 418.

It is finally contended by appellant that the verdict is against the manifest weight of the evidence and each of the parties, with much credit, have forcibly and minutely presented all phases of the case to this court. It is for this court to determine, not the preponderance of the testimony in the record nor generally the credibility to be accorded to the various witnesses, but whether there is a sufficient amount of reasonable testimony, if believed and relied on by the jury, to support the verdict. There is no question but what relatrix was an unmarried woman at the time of the birth of her child, and that she had not been married before, that her child was born March 20, 1927, was born alive and was living at the time of the trial; that the appellant and the relatrix were together and no one with them in appellant's car on the night of July 4, 1926, when they left appellant's home about ten o'clock at night or shortly before. It is also undisputed that at the time they left appellant's home together in his car it was the intention of the relatrix that he should take her directly to her home, and it was for that stated purpose that appellant started with her.

There is no question but what they drove to the home of the father of relatrix, which was about a quarter of a mile east of the residence of appellant. After they arrived in front of her father's home the testimony is conflicting as to what took place from that time on that night. It is also true that it is undisputed that the first time appellant was accused of being responsible for the pregnant condition of relatrix was a day or two after the November election following the 4th of July in question. On this November morning he came to the home of the father of relatrix and was there told by Warren Mesecher of the condition of relatrix. The testimony also agrees that on the afternoon of the same day appellant, his wife, his brother

Milton Shryack, his sister-in-law Alice O. Curran and Josie A. Jacobs went to the country school house where relatrix was teaching for the evident purpose of trying to secure an admission from her that would absolve appellant from any responsibility for her condition. There is no question but what her child was born 269 days after the night of July 4, which is within eleven days of the average time for the birth of a full time child. The undisputed medical testimony is that the average time for the birth of a full time child is 280 days from conception, and that a normal child may vary two weeks either way from this 280 day period.

Briefly, the testimony of relatrix is to the effect that just before arriving in front of her home appellant speeded up his car, driving on past, and in response to her inquiry stated that he wanted her to go on to Macomb with him for ice; that she remonstrated but that he persisted in proceeding. The road that was taken has been described in detail. According to her testimony they arrived at a secluded place over a quarter of a mile from any house, on a by-road near a country church, where he stopped the car, asked her to get out, and upon her not doing so took hold of her and pulled her from the car; that she struggled, became exhausted and lost consciousness; that the act of intercourse then undoubtedly took place and when she first regained consciousness she was in the car and on the way back home; that the only remark that the defendant made to her that she recalls is that he told her not to say anything about this to anyone, that it didn't hurt her; that nothing more was said until they reached her home where he stopped in front of the house and said goodnight, to which she made no reply. Her story of becoming unconscious in the course of her struggle with appellant is corroborated by Dr. Ben J. Jenkins, a physician of many years standing in Macomb, who testified that since she was twelve or thirteen years

of age she had endocarditis which resulted in a leaky valve of the heart; that a person with this trouble is not able to stand any exertion and upon exerting himself is liable to faint or become exhausted; that this condition might come rapidly or suddenly. The doctor testified that this disability was permanent and that she had it on July 4, 1926, she having been a patient of his at different times for a number of years. Further corroboration of this condition is the fact that earlier that summer while a student at the State Teachers college at Macomb she had been placed in the restricted class in her physical education work. The evidence of the teacher at the college is that those who are placed in restricted classes are those who are not able to take regular gymnasium work and are given special work. The only thing that could possibly controvert the above mentioned evidence with reference to her heart condition is the evidence of Dr. Markee who examined her in June, 1926, for admission to the McDonough County Tri-State Mutual, an insurance lodge, in which examination he passed her as physically fit for insurance. His testimony as to her condition is not positive. No report or record of his examination was produced, and his testimony was, "I think her heart was normal at that time."

Relatrix is further corroborated with reference to the time she returned home by her sister Carol Shryack, who was then about sixteen years of age, and Roscoe Scott, a young man who was calling upon Carol that evening. The evidence shows they were sitting in Scott's car in the yard near the Shryack home (relatrix's father's home) in the neighborhood of eleven o'clock; that a car stopped in front, someone got out and Carol recognized appellant's voice when he said good-night. She recognized her sister going from the car to the house. Roscoe Scott knew that the car that stopped was a Ford touring car, being the same kind of a car

that Ross Shryack drove; that its lights were on and that somebody got out of the car and went to the house. He did not recognize the person but Carol told him that it was her sister Marian.

The evidence on the part of the defendant is to the effect that his son Faye, May and Laura Curran, the daughters of his sister-in-law, Alice O. Curran, and his daughter Ruth were at appellant's home on the night of July 4th, when he started to take Relatrix home. Relatrix testified that he said he was going for ice and got a gunny sack or blanket and threw it in the back of the car. This is denied by appellant and by some of these witnesses. The two Curran girls, Faye Shryack, his son and appellant all say that he was not gone more than ten minutes; that he returned to his home, got a drink, smoked his pipe and went to bed, and that they were all in bed at ten minutes after ten. His son Faye testified that he stood at the corner of the house and saw his father turn around at the Frank Shryack home and come immediately home. No reason is assigned for the son's solicitude regarding his father's movements that night.

It is submitted that a large amount of testimony that was taken with reference to what happened during the day of July 4, 1926, and during the evening of that day up until from nine fifteen to ten o'clock p. m. is to a great extent immaterial as it largely concerns matters which shed no light upon the issue in this case. In view of the rule of law that where the evidence is conflicting and various witnesses on one side testify diametrically opposite to those on the other side, then it becomes the duty of the jury in the first instance and later the court on appeal to determine which witnesses are credible and that must be determined almost exclusively from the reasonableness of the stories told by them.

It is contended that from all the evidence in this case, conceding for the purpose of argument that appellant is absolutely innocent of that with which he is charged, he had no reason, nor did any of his witnesses have any reason, to charge their minds with any of the occurrences which took place on Sunday, July 4th, until a day or two after the election in the following November, a period of four months later. If appellant is innocent and had no special occasion to charge his mind with what took place on that day, the occurrence of that day were so commonplace and so far from being unusual that it would be practically impossible for any normal person to recite what took place in detail as has been recited in the testimony in this case. In this particular, what happened during the day on Sunday and Sunday evening in going to church and returning home is significant on account of the absolute positiveness with which the various witnesses swore to the exact seat in appellant's car occupied by the seven people who rode in it. If appellant had not had the occurrence of that day impressed on his mind indelibly, it would have been impossible for him and his relatives, who are the only material witnesses, to detail the matters they testify to after the lapse of four months' time. The relatrix did have the occurrences of that day impressed on her mind by what took place, and for the same reason appellant had the occurrences of that day indelibly fixed in his mind if the charges made are true.

In appellant's argument it is stated, "The evidence shows clearly that appellant is not the father of relator's child, but does show that the father is Warren Mesecher or Glenn Mesecher." It is contended that there is not a scintilla of evidence in this case from start to finish to warrant such a statement or anything from which such a conclusion can be reached.

Under the rule announced in the case of *The People v. Kirk*, *supra*, any inquiry along this line was wholly unwarranted and improper and should have been excluded by the court for the reason that, as stated in that case, before it is proper to introduce evidence tending to show relations between the relatrix and another other than the defendant, it is necessary to show first that there was the opportunity for someone other than the defendant to be the father of the child, and secondly that there was the disposition on the part of the relatrix and such other person to have intercourse together.

The evidence in this case fails to show any opportunity for such relations between relatrix and Glenn Mesecher, because it does not show that they were ever together at any place where there would be the opportunity for such an act, unaccompanied by other people. With reference to Warren Mesecher there is no opportunity shown other than the fact that he and his wife for a time resided with the parents of relatrix and that relatrix was seen at various times during the daytime riding with him in his car, and so far as the evidence shows they were at no place where any opportunity would be afforded for such an act. In the second place there is not a scintilla of evidence in this record that there ever was, either in the period of gestation or outside of it, any disposition on the part of relatrix or either of the Mesecher brothers to have sexual intercourse together.

It appears from the evidence that Wednesday or Thursday following the November election on Tuesday in 1926, was the date on which appellant was first accused by Warren Mesecher and Lorene Shryack, the mother of relatrix, of being responsible for relatrix's pregnant condition. This occurred about eight thirty in the morning. Warren told him that relatrix said that she was pregnant and he was responsible. Relatrix's mother says that

appellant said to her, "Lorene, why didn't Marian come to me about this?" Warren Mesecher says that after Mrs. Shryack left he said to appellant, "You know it is yours," and appellant said, "I want to see Marian about this." This version of these two witnesses as to appellant's remarks is contradicted by appellant. He says that when Mrs. Shryack accused him of it that he said no.

That same afternoon appellant came to Macomb, got his sister-in-law Alice O. Curran, who is an attorney, Josie A. Jacobs, who is an experienced stenographer, his brother Milton and his wife and went to the school house where relatrix was teaching. The evidence discloses that Mrs. Jacobs was taken along to take down what was said. Mrs. Curran says that she asked relatrix in the presence of Mrs. Jacobs and before others had come in the school house, "Have you been with anyone else?" and she said, "Yes, a Mesecher boy." I said, "More than once?" and she said, "Yes, a number of times. Relatrix says she understood when asked these questions whether she had ever gone with anyone. What took place at the school house is not especially material except that it is admitted by all who were there and testified that relatrix accused appellant before his wife and before his sister-in-law and the stenographer of being the father of her unborn child; and it is also true that he denied that he was. It was evidently the purpose of this number of people going to the school house to try to get her to make some statement that would thwart any proceeding against appellant. It is also significant that Mrs. Jacobs, the stenographer, was not used as a witness for the appellant. It is also significant that she heard but little of what the other witnesses testified to that occurred during that talk, according to her testimony for relatrix.

Alice O. Curran, a witness for appellant and a practicing lawyer, is a sister of appellant's wife and of Milton Shryack's

wife, and while she testified that she was not one of appellant's attorneys, she sat at counsel's table, answered questions to the lawyers and once was admonished by the court for talking within the presence and hearing of the jury.

Much is made of the evidence for appellant that there was but one light on his car on the night of July 4, 1926. This condition is positively sworn to by six witnesses produced by appellant. It is interesting to note who these witnesses are: appellant, Milton Shryack, his brother; Burnette Shryack, appellant's nephew; Fay Shryack, appellant's son; Mae Curran, niece of appellant and daughter of Alice O. Curran; Alice O. Curran, sister of appellant's wife, also a sister of Milton Shryack's wife, and also the wife and law partner of her husband, Don J. Curran, who is one of the attorneys for appellant. Three of these witnesses were in the party who went in a body to call on relatrix at the country school house for the evident purpose of getting a defense to the inevitable suit that would follow. They were fortified with an experienced stenographer to take down all her statements that might be damaging to her. The mission was not especially successful. The stenographer was called by the relatrix and testified to what she heard said, which was not as much as some others testified to. The witnesses above mentioned were the principal witnesses for appellant. It should be borne in mind that the fact that appellant's Ford car had one light out on the night of July 4, 1926, was such an event in the lives of these six witnesses that they were able to recall it after the lapse of four months when nothing had happened during that time to recall the incident.

The defense in this case is based on the theory that this is a conspiracy to charge appellant with the paternity of the child of relatrix. What motive does the evidence disclose for such a

foul conspiracy? How could relatrix or her family possibly profit by such a scheme?

There is no evidence or circumstances from which it can possibly be even inferred that the relatrix ever had intercourse at any time with anyone but appellant. There was no attempt to secure a money settlement beyond an amount sufficient to defray her actual expense prior to and at the birth of her child; so it was not money they were after. The evidence shows that they were cousins and the families were very friendly. Appellant was their near neighbor who was called upon for advice and assistance since the father and husband was incapacitated. No trouble or difficulty had ever arisen between them. The facts warrant the conclusion that relatrix and her family considered appellant their best and most dependable neighbor and friend. Further appellant was a man over twenty years her senior with grown children and a wife with whom he lived, so there was no possibility of marriage with him to give her child a name and remove the stigma of remaining an unmarried mother. Viewed from any angle there is no reason or motive for relatrix to falsely accuse appellant with the paternity of her child. Such things are not done without some reason or motive.

Relatrix was on friendly relations with appellant's parents and had stayed at their home over night but a short time before this occurrence. On the question as to the manifest weight of the evidence, we have necessarily given greater consideration to the proofs submitted by relatrix to determine whether there is in the record sufficient legal evidence and determine on which side the preponderance lies in place of the jury; but it is the province of a reviewing court to determine if there is sufficient reasonable evidence in the record to support the verdict, and doing that we are not able to say

that the verdict is manifestly against the weight of the evidence.

Relatrix and appellant each have tried this cause and submitted instructions upon the theory that the jury were to decide the issues by a preponderance of the evidence, and the jury has so decided the issues. Relatrix and appellant being first cousins the cause and complaint involved the crime of incest, a felony in this state, and apparently appellant should have been entitled to the rule of reasonable doubt which he had a right to waive and has waived.

Finding no errors in the record that will warrant a reversal, the judgment of the County Court of McDonough County is affirmed.

Affirmed.

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254 I.A. 624⁴
General No. 8306

Agenda No. 15

JANUARY TERM, 1929

B. L. Renfrow, Appellant,

vs.

Henry Kramer and Margaret Kramer, Appellees

Appeal from the Circuit Court of Sangamon County
SHURTLEFF, J.

This case arises out of a judgment entered by confession in the Circuit Court of Sangamon County on October 11, 1927, in favor of B. L. Renfrow, appellant, and against Henry Kramer and Margaret Kramer, his wife, appellees, for the sum of \$7,281 and costs. On October 22, 1927, appellees moved the court to set aside the judgment, for leave to plead to the merits, for stay of execution pending the motion and for leave to file affidavits in support of the motion, which motion for stay of execution and for leave to file affidavits was allowed.

Thereafter there were filed in support of the motion to open up the judgment and for leave to plead, the affidavits of C. B. Meredith, Tina Kramer, Henry Kramer, William Kramer and of Henry Kramer, Sr., and Margaret Kramer, appellees.

It appeared from these affidavits that appellees were an aged couple residing on a farm near Emden, in Logan County, Illinois; that they owned eighty acres of land in Macoupin County, Illinois, and one hundred seventy acres of land in Missouri, all of which was unencumbered; that C. B. Meredith Frank C. Jones and Ralph Jones, his brother, and Edward H. Rimmerman were all engaged in the real estate business, and Appellant B. L. Renfrow was engaged in the loan business; that all were located in Springfield; that Edward D. Henry was a lawyer in Springfield and was attorney for Frank C. Jones as well as for Appellant Renfrow; that Rimmerman

was agent for the sale or trade of a 240 acre tract of land in Macoupin County, which belonged to one Marvel Thomas, and that during September, 1926, he was negotiating with the Kramers for the exchange of their land for that of Thomas; that he was unable to effect a trade with the Kramers and, knowing that Meredith had had previous transactions with them and that they reposed confidence in him, brought Meredith into the transaction for the purpose of making the trade; that it was finally agreed that the Kramers should take the 240-acre Thomas tract, subject to a mortgage for twelve thousand dollars for their Missouri and Macoupin county land; that in order to carry out the agreement Ralph Jones, brother of Frank C. Jones, who was associated with Rimmerman, was to take title to the Thomas tract, procure the necessary loan for twelve thousand dollars and convey it to the Kramers subject to the mortgage, the Kramers at the same time conveying their land to Ralph Jones; that in order to enable Rimmerman and his associates to effect the trade of lands with the Kramers and to facilitate the transaction between Rimmerman and his associates and Thomas, it was proposed to the Kramers that they execute a mortgage for six thousand dollars on the Missouri land prior to their conveyance of it to Ralph Jones subject thereto; that it was explained to them that this would expedite the trade, would save Jones and the others a trip to and from Springfield and perhaps to Missouri; that it would be a great convenience to them and would in no way involve the Kramers in any liability; that Meredith, at the request of Rimmerman and Frank C. Jones, went to Appellant Renfrow and explained the entire proposed transaction to him and he agreed to lend the sum of six thousand dollars on the security of the Missouri land and to look to Rimmerman and his associates for it, it being explained to Renfrow that Ralph Jones was to take title to the Missouri land and that the Kramers were to receive no consideration whatever for the proposed mortgage or for any note that might be secured by it; that

thereafter on October 5, 1926, Meredith and Frank C. Jones went to the Kramer home with a six thousand dollar note, payable to Edward D. Henry, attorney for appellant, B. L. Renfrow, and a mortgage or trust deed to him for the Missouri land, these papers having been prepared in the office of Mr. Henry.

While Meredith says in his affidavit that the papers were all read to appellees in the presence of their son and daughter, and that they signed the same on the assurance that they were assuming no obligation for the six thousand dollars but that the same would be taken care of by Rimmerman and Jones, and that the papers were being executed only for the convenience of the latter, the affidavits of Tina Kramer, Henry Kramer, Jr., William Kramer and of each of the appellees filed in support of the motion, all state that no note for six thousand dollars was mentioned or read although Frank C. Jones said he would read and purported to read all the instruments and papers which were to be signed.

The affidavits further show Appellee Henry Kramer to have been seventy-four years of age and very feeble, being scarcely able to write his name and unable to read accurately; that his wife, Margaret, was seventy-six years of age, also very feeble, scarcely able to write her name and able to read only with considerable difficulty; that they had great confidence in Meredith; that appellees never intended to sign any note and that neither they nor the others present knew they had done so until they learned such a note was in the hands of appellant, and that if any such note was signed by them it must have been inserted among other papers and signed without any knowledge thereof on their part and without any intention to do so. The affidavits further show that appellees never agreed to execute any such note; that they never received any consideration therefor and that they fully performed their agreement for the exchange of lands when they conveyed their eighty acres in Macoupin county and their one hundred seventy acres in Missouri

and took the Thomas two hundred and forty acres subject to a mortgage for twelve thousand dollars, which they assumed and agreed to pay.

Upon this showing made the court allowed the motion to open up the judgment and for leave to plead, the judgment to stand as security.

Pleas and affidavit of merits were filed and thereafter the cause went to trial upon the declaration, defendants' pleas numbers one and two, which were, respectively, **non est factum** and non-assumpsit, sworn, to; defendants' first, second, third and fourth additional pleas which were, first, want of consideration and notice thereof to plaintiff; second, fraud and circumvention in obtaining the note; third, fraud with the allegation, by way of inducement, of want of consideration and notice thereof; fourth, fraud and circumvention in obtaining the instrument and notice thereof; replications, rejoinders and sur-rejoinders and affidavit of merits.

Upon the trial of the case the evidence disclosed all the facts set forth in the affidavits above referred to and in addition thereto that Mr. Henry, the payee, was acting merely as attorney for Frank C. Jones and Appellant Renfrow; that he drew the papers at the suggestion of appellant; and that in procuring the preparation and execution of the papers Jones and Meredith were acting after consultation with and under the direction of appellant.

The contract for the exchange of lands was in writing, signed by the parties, and did not cover the mortgage of the Missouri lands or comprehend any six thousand dollar note. Appellees, at the time of signing said contract, had signed a note for fifteen hundred dollars, in accordance with the terms of said contract, to show good faith and to apply upon the said sum of twelve thousand dollars, which note had been turned over to appellant as collateral security for a one thousand dollar note given by Jones and Meredith

and which appellant had carried for a long time. It appears that on the day appellees had signed the six thousand dollar note and before signing appellant had delivered the fifteen hundred dollar note to Jones and Meredith to be delivered to appellees when they signed the six thousand dollar note. It appears from the testimony that for the six thousand dollar note appellant turned over to Jones and Meredith the one thousand dollar note and the fifteen hundred dollar note—appellees' note and the sum of \$3150. Appellant claims to have paid an additional sum of three hundred dollars to Meredith, but on this matter the record is somewhat in doubt or confused. The cause was submitted to a jury and there was a verdict for the defendants, appellees. Motions for judgment **non obstante verdicto** and for a new trial were overruled and judgment was entered upon the verdict, to reverse which appellant has brought the record to this court for review.

Appellant's main contention and ground for reversal of the judgment in this cause is that the court erred in entering its order opening the judgment and permitting appellees to plead, and that the court erred in refusing to strike appellees' amended affidavit of merits from the files and for judgment.

At the outset of the case we are met by a motion of appellees to strike from the files a purported bill of exceptions taken by appellant and filed January 14, 1928, and also to strike from appellant's bill of exceptions filed November 13, 1928, all that part of the bill setting out proceedings purporting to have been taken and entered prior to the September term 1928, of said court, that being the term during which the cause was tried and the bill of exceptions taken. The judgment by confession was entered at the September term, 1927. The motion to vacate and an order vacating was entered at the November term of the court, 1927. In the common law record furnished this court is shown an order vacating the judgment and giving appellees leave to plead on December 30, 1927,

during the November term of said court. On January 10, 1928, during the January Term, 1928, of said court, there was filed what purported to be a bill of exceptions over the signature and seal of the judge, setting out a motion to vacate the judgment in question setting out various affidavits apparently offered in support of the motion, but the bill shows no ruling of any kind made by the court thereon, and in the bill no exceptions were taken. The common law record shows that an exception was taken to the order opening the judgment, but it is not shown by a bill of exceptions and it is not shown but that other proof was submitted to the court upon which the order was entered. Appellant contends that this record is sufficient to bring before this court the sufficiency of the proofs upon which the court opened the judgment and cites **Patton v. Young**, 233 Ill. App. 515, in which the court say:

“Appellant argues that there was no sufficient showing to authorize the court to open the judgment and permit a defense to be made. The motion and affidavit are not a part of the common law record. If appellant desired to question the court's ruling in that regard he should have preserved, in a bill of exceptions, the evidence upon which the court acted. Having failed to do so we must presume that the court ruled correctly. It is true that the clerk has included the motion and affidavit in the transcript of the record but they are not a part of the record and cannot be considered. **People v. Faulkner**, 248 Ill. 158.”

In **People v. Faulkner**, *supra*, referred to, the court say on page 160:

“Counsel for the defendant in error say that the question whether the evidence is sufficient to support the verdict is not open for review here, for the reason that no motion for a new trial appears in the bill of exceptions, and that there is not preserved in the bill of exceptions an exception to the action of the court in denying the motion for a new trial. We cannot

consider the question of the sufficiency of the evidence to support the verdict except when the motion for a new trial, the ruling of the court upon the motion and the exception to the ruling of the court are incorporated in the bill of exceptions. 'In order to present to this court the question whether a verdict is against the evidence it is necessary for the party against whom the verdict passes to make a motion for a new trial, and upon the motion being overruled to except to such ruling and to preserve that exception by the bill of exceptions.' (**People v. Moritz**, 238 Ill. 494; **Yarber v. Chicago and Alton Railway Co.** 235 id. 589.) An inspection of the court record discloses that the clerk, in writing up the judgment, recited the denial of a motion for a new trial and the exception of the plaintiff in error to such denial. Such an exception cannot be made to appear in that manner. It can only be preserved by the bill of exceptions. **People v. Moritz**, *supra*, **Bruen v. People**, 206 Ill. 417; **Steffy v. People**, 130 id. 98."

It is fundamental to take advantage of an exception to the court's ruling upon a motion that the motion and the action of the court thereon must be preserved by a bill of exceptions. (**McDonald v. The People**, 222 Ill. 329; **Tonville v. Sausser**, 73 id. 451; **Gaynor v. Hibernia Savings Bank**, 166 id. 577; **Reed v. Horne**, 73 id. 599, and **Snell v. M. E. Church**, 58 id. 290.) In **Snell v. M. E. Church**, *supra*, the court said:

"In regard to the ruling of the court in striking the third plea from the files the motion and ruling of the court in that respect are not preserved in the bill of exceptions and the same are not before us for consideration."

In **Gaynor v. Hibernia Savings Bank**, *supra*, Mr. Justice Cartwright said, on page 579:

"The only error alleged is, that the court erred in striking the plea from the files, and it has been repeatedly held that such action of the court cannot be considered unless the motion,

decision and an exception thereto are presented in a bill of exceptions, so that the error, if any, may appear from the record. Where there is no bill of exceptions the motion and decision do not become a part of the record, and it will be presumed that the action of the court was correct."

The holdings are uniform upon this question, that the bill of exceptions must contain not only the motion and all proofs offered thereupon, but the ruling of the court and the party's exception to the ruling. The bill of exceptions of January 10, 1928, should be and is stricken from the files.

Upon the trial of the cause, appellant, at the close of all the testimony, moved for an instructed verdict and to strike all of the testimony offered by appellee from the record. This motion was chiefly based upon the ground that the affidavit of merits, which the court permitted appellees to file at the May Term, 1928, was insufficient to present any defense to the action.

The last amended affidavit of merits was filed at the May Term, 1928, of said court. No bill of exceptions was taken or prayed for by appellant at said term. The cause was tried at the September Term of said court, 1928, and a bill of exceptions taken at the conclusion of said trial at said September Term. This bill of exceptions purports to contain matters, motions and rulings of the court at the May Term of said court, 1928, and among other matters a motion to strike said affidavit of merits from the files. Appellees have moved to strike this and other matters from the bill of exceptions.

The affidavit of merits is not a part of the common law record and can only be preserved for a review by a proper bill of exceptions. (*Snell v. Trustees M. E. Church*, 58 Ill. 290; *Toddy v. McCleave*, 59 Ill. 182; *Tonville v. Sausser*, 73 Ill. 451; *Fanning v. Russell*, 81 Ill. 398; *Harmon v. Callahan*, 207 Ill. 508.)

It has been held that the rule laid down in **Whiting v. Fuller**, 22 Ill. 33, is no longer the law of this State. In a long line of decisions it has been held and the rule adhered to in this State that the bill of exceptions must be taken at the term at which the rulings excepted to are made, or within such time as the court may, at that term, have granted for that purpose. (The village of **Franklin Park v. Franklin**, 228 Ill. 591; **The People v. May**, 276 Ill. 332, and **Kimber v. Kimber**, 317 Ill. 566.)

In **The People v. May**, *supra*, the court said: "A bill of exceptions must be taken at the term at which the ruling excepted to is made or within such further time as the court may at that term grant for that purpose. (**Village of Franklin Park v. Franklin**, 228 Ill. 591.) No bill of exceptions was taken at the May Term, so that there is nothing to review concerning any motion or any petition or order at that term."

In the opinion of this court all of the matters, rulings and motions occurring at the May Term, 1928, of said court and purporting to be shown by the bill of exceptions taken at the September Term of said court thereafter, should be and are stricken out and this court has given no consideration to the merits of any such controversies.

This covers the substantial errors assigned. Appellant contends that regardless of the rule as to the bill of exceptions entered at the September Term, covering matters having taken place at the prior May Term, on the motion for a judgment **non obstante veredicto**, entered by appellant, the court was permitted to search the entire record and should have entered a judgment for appellant. We can not agree with this contention. If the exception of appellant to the court's ruling at the May Term in refusing to "strike appellee's affidavit of merits from the files" is not before this court for review, it was not before the lower court at the September Term when the motion was passed upon by that court. We do not

intimate in any manner that appellees' affidavit of merits was insufficient or should have been stricken. Appellant contends all through the case that he purchased the note from his attorney, Henry, and is a holder in due course. The proofs do not establish this state of facts. Henry never had any interest in the note but was used merely as a medium of convenience to place the title of the note directly in appellant from appellees. The whole purpose of the note was fully explained to appellant by Jones and Meredith before the transaction was entered into, and appellant was fully informed that appellees were never to receive any consideration for the note, even if they were to be apprised as to the signatures. At first appellant insisted that appellees come to Springfield to sign the note, apparently showing knowledge of the circumstances under which the note was to be executed. In effecting the signatures to the instruments Jones and Meredith merely carried out the directions given them by appellant, and appellant in this cause is chargeable with all they did.

Appellant's relation to the note in question is more accurately defined in the Negotiable Instruments Act, of which section fifty-two defines a holder in due course as follows: "A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That the instrument is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Sections 55 and 59 provide as follows: "55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith or under such circumstances as amount to a fraud."

"59. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

The cause was submitted to the jury squarely upon the issue as to whether appellant was a holder in due course of the note, and as to the consideration for the note and whether it was an accommodation note and as to the question whether fraud and circumvention entered into the execution of the note with the burden of establishing every issue so made placed upon appellees, and from reading the evidence in this cause we are satisfied that the verdict found by the jury is fully supported by the proofs.

Three instructions only were given for appellees of which appellant complains. We have examined the instructions and are of the opinion that they state the law accurately as applied to the facts in this case.

Finding no error in the record warranting a reversal, the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

abst.

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254 I.A. 624⁵

General No. 8252

Agenda No. 1

JANUARY TERM, A. D. 1929

Fred Genzel as Administrator of the Estate of Charles
Wellman, Deceased, Appellee.

vs.

New York, Chicago & St. Louis Railroad Company,
Appellant.

Appeal from Vermilion

NIEHAUS, PJ.

This action was brought by Fred Genzel, the appellee, as administrator of the Estate of Charles Wellman deceased, under the Federal Employers Liability Act, for the benefit of the next of kin of the deceased, in the circuit court of Vermilion county, against the New York, Chicago & St. Louis Railroad Company, appellant, to recover damages for the alleged wrongful causing of the death of the deceased, which occurred on June 18, 1926. The deceased was an employe of the appellant; and at the time of his death, was acting as flagman for an extra gang of workmen, who were at work putting in new ballast in the appellant's road bed; also some new track. This extra gang on the day referred to was working on the railroad track just west of Padua, a station on appellant's railroad; and on that day were putting in new rails. The deceased, upon assuming his duties as flagman, to signal trains coming toward Padua, received particular directions from the foreman of the extra gang of workmen with reference to placing torpedoes on the tracks as warning to

trains; and he was directed to proceed towards Ellsworth, the next station east, and to the top of a hill which was about a mile east of Padua, and there to place two torpedoes on the rails, two rail lengths apart; then to come back to a point near the highway crossing located some distance east of Padua. And the deceased thereupon started out to perform his duties assigned to him as flagman; and apparently to carry into effect the directions given him by the foreman. It is evident, that the deceased had gone to the top of the hill, and had placed two torpedoes on the rails there; but no one appears to have seen him after he had started out in the performance of his duties until he was discovered suddenly by the fireman on the engine of the west bound local passenger train which caused his death, just before the train struck him. He was then lying on the railroad track on which the west bound train was running; and against the south rail of the track, about 46 feet from the end of a curve in the track towards the west; and at a point 888 feet east of the center of the highway crossing near Padua and opposite a wild cherry tree located near the rail road track.

The declaration filed in the case consists of six counts; the first, third and sixth counts charge wilful and wanton injury to the deceased by appellant's servants; and the fourth, seventh and eighth counts charge negligence. The first

count alleges, that the deceased on the day in question was acting as flagman of trains running along appellant's track between Ellsworth and Padua; and that, while so employed as flagman, two servants of the appellant called engineer and fireman, who were in charge and propelling a passenger train used in interstate commerce, traveling westerly past the village of Ellsworth toward the deceased; and that said engineer and fireman each then and there well knew that one of such flagman was likely to be upon and along said track at a location two miles east of Padua and between said villages of Padua and Ellsworth; and avers, that in violation of their duty the engineer and fireman propelled said train under their control, along the track up to and past said Charles Wellman, and while so doing said engineer and fireman wilfully recklessly and wantonly failed to exercise such care to keep a lookout for the deceased whereby the engineer and fireman did not see and know of the presence of the deceased in time to warn him of the approach of train, or to control its movements as to avoid injuring the deceased; and that in consequence of such wilful wanton and reckless conduct by the engineer and fireman without sufficient warning ran upon and struck the deceased, etc. The third count avers, that the appellant's servants, the engineer and fireman who were in charge of the passenger train in question and propelled the same toward and past where the said Charles

Wellman was stationed as flagman; and where he was at that time lying reclining or sitting asleep sick or resting upon next to and against the rail and ties of the main track in such a position that he would be struck and injured or killed by trains of the appellant passing along; and that with such knowledge of the presence and position of Charles Wellman the servants in charge of said passenger train wilfully failed to so control the speed of the train; and that in consequence thereof the train with great force and violence ran upon and against Charles Wellman, so that he was so severely wounded, injured and mangled that he died. The sixth count avers, that when the train was approaching the deceased, who was lying or sitting on the track, and when within to wit 300 feet from him the fireman and engineer knew that Wellman or some object resembling a human being was there; and that after seeing said object they could by the exercise of ordinary care have stopped the train or slowed its speed to such an extent that they would not have run upon and against the deceased and injured him; but that in violation of their duty the fireman and engineer wilfully wantonly and recklessly drove and propelled said train at the high and dangerous rate of speed to wit forty miles per hour upon and against the deceased, in consequence of which wilful conduct by the engineer and fireman the deceased was struck with such force and violence and so injured that he died, etc..

The trial of the case resulted in a verdict finding the appellant guilty and assessing appellee's damages at \$9000.00, upon which judgment was rendered; and this appeal is prosecuted from the judgment.

At the close of all the evidence, the appellant moved the court to direct a verdict of not guilty on each of the three counts charging wilful and wanton injury, which the court denied; and this ruling of the court is assigned as error. Concerning the facts that pertain to the question of wilful injury, it may be pointed out, that the engineer and fireman were the only witnesses on the trial who appear to have had personal knowledge about how the injury occurred which resulted in the death of the deceased. The engineer F. R. Nelson, testified as follows: "I was the engineer on that train on that morning as we came west from Ellsworth. ** My engine was equipped with automatic bell ringer and that was turned on on leaving the station at Ellsworth, and it was not shut off between that time and the time of the accident, and the bell was ringing continuously. **** Going around and through this cut my engine and train was running 35 miles an hour, and my location in the locomotive is on the north or right hand side of the engine as it goes west. There is a cab at the back end of the engine in which we are seated, along the side of the boiler, and the boiler projects about two feet above my head

when seated in the cab, and it projects to the front of where I sit about 35 feet. On top of the boiler is a steam dome, a sand box, a bell and a smoke stack. When running on a straight track the front end of the boiler cuts off my view to the south at a point about 80 or 90 feet in front of the locomotive, that is, cuts off my view of the opposite side." Concerning what occurred just before the deceased was struck about opposite the cherry tree near the end of the curved track, he testified as follows: "The whistling post for the highway was, I expect, 300 or 400 feet east of the cherry tree. At that whistling post I gave two long and three short whistles, then I ran over some torpedoes, two of them, I should judge about 200 feet east of the cherry tree, and right close to where I made my crossing whistles. When I ran over them I gave two sounds of the whistle. As I came west from Ellsworth I did not see any one on or along the track on either side. I had seen no flag man. The flagman should have been on my side of the track. There was no flagman there on that day that I saw. After I ran over the torpedoes, I gave the whistle signal, I had no notice that I had struck or was about to strike anything until after I hit, and the fireman hollered at me. We were just going by the cherry tree when he hollered at me, and when he did I set the air in emergency. I had made an application of the brakes before that, a service application, when we went over the torpedoes.

By the service application I mean the application of 15 or 20 pounds to slow the train down. When I passed the cherry tree, in my judgment, we were running 15 or 20 miles an hour up to the time the fireman hollered. I had not seen anybody, or anything, and did not know there was anybody in that vicinity. And the first notice I had was when the fireman hollered, and I then made an emergency application of the air.

***** Coming west from Ellsworth and beginning about a mile west of Ellsworth, the track is a reverse or S curve, and through that curve it is in a cut, and the earth is piled out to the sides that was taken from the cut, and it is quite a little higher than the track. When the train stopped, I backed it up opposite the man, and then got off the train and went back and found a man laying there about six or seven feet from the south rail of the track I should judge, and there was a flag and some torpedoes lying along side of the track. I took the flag and put it over on the north side of the track and stuck it in the ground in an upright position. **** None of the extra gang were working at or near the place where this accident took place that day. They were working a quarter of a mile west of Padua, and their bunk cars were in Padua, and had been all the time the extra gang was there, three or four weeks *** The flag man was not out there every day. They had a flag man out on days when they were taking up rails and

putting down rails."

The testimony of P. E. Bennett, the fireman is as follows: "I was fireman on train No. 5 going west on June 18, 1926. **** That day was clear, the weather was warm, and the sun was shining. The engine was equipped with a bell and a steam whistle for the purpose of giving signals. The bell would weigh about 100 pounds and was located about six feet in front of the cab. It was operated automatically with air. As we came westward from Ellsworth that day, the bell was turned on and was ringing with air. It was not shut off from the time we left Ellsworth until after the accident occurred. It was ringing continuously. As we came west from Ellsworth, and before the accident, a road crossing whistling signal was given, and two short blasts of whistle when we ran over the two torpedoes. The boiler projects about two feet above the head of the engineer and fireman, and my seat in the cab was back of the end of the boiler. As we came west from Ellsworth I put a fire shortly after leaving the depot, and at the time these torpedoes went off, I was sitting on my seat box watching ahead. As we went west I saw no flag man out. If a flag man was out he should have been on the north side of the track, standing up, with his red flag unfurled. *** Coming west out of Ellsworth the track is straight for about a mile, then

it makes an S curve, and through that S curve the track is in a cut. We ran over the torpedoes about 150 or 200 feet east of the cherry tree, and they were about 50 feet apart. When we ran over the torpedoes the engineer immediately applied his air to reduce the speed of the train and answered the torpedo signals with two short blasts of the whistle. Up to the time we ran over the torpedoes we had been running at a speed of about 35 miles an hour and when the engineer applied the air, he closed the throttle, and when we passed the cherry tree I judge the speed was from 15 to 20 miles an hour." In reference to his observance of the deceased on the track, he testified as follows: "Q. Now before you got to the cherry tree sitting up there on the seat, what way were you looking? A. Looking ahead. Q. Looking to the west? A. Yes sir. Q. Did you see anything or any object? A. I saw an object, yes sir. Q. Where was it? A. It was lying on the outside of the south rail. Q. How far was you from it when you first saw it? A. About 100 feet. Q. And could you tell what it was? A. I could not. Q. What did you think it was, if you thought? A. I thought at first—Mr. Hutton—I object, I don't think that would be proper. Q. What did it have the appearance of being? Mr. Hutton—Object to that—describe it. Q. Yes, describe what it looked to you like? Mr. Hutton,—No, object, he may describe it. Mr. Steeley—that is describing it. The

Court—Objection overruled. A. At first I thought it might be—Mr. Hutton—I object to what he thought. The Court: If he has an impression as to what it was, he may state. A. I first thought it was a dog, then I thought it might be some of the section's man's coats. Q. And when did you discover it was a man, if you did discover that fact? A. Just about 50 feet before we hit it. Q. Did he make any stir there where he lay? A. He didn't move, that I noticed. O. And what did you do when you discovered it was a man? A. I called to the engineer that we struck a man. Q. What did the engineer do? A. He immediately made an emergency application to stop the train."

It is apparent from the foregoing testimony, and there is no evidence to the contrary, that neither the engineer or fireman had any knowledge of or reason to have knowledge to believe that the deceased would be lying on the railroad track; and he was not seen until discovered by the fireman; when it was too late for the engineer to stop the train, or to do anything to save the deceased from injury.

In the case of *Iamaree v. C. C. C. & St. L. R'y Co.* 217 Ill. App. 305, this court stated the general rule of law which was uniformly recognized by the courts as basic of what elements constitute wilful and wanton conduct: "In order that one may be held guilty of wilful or wanton conduct, it must be shown, that he was

conscious of his conduct and conscious, from his knowledge of existing conditions, that injury would likely probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result. In order to establish wantonness it is not necessary to show an entire want of care. The violation of a statute does not constitute a wilful wrong. A wilful injury will not be inferred when the result may be reasonably attributed to negligence or inattention." (29 Cyc 510.)

Without passing upon the question whether or not there was negligence involved in the conduct of the engineer or fireman in the management and running of the train in question, it is clear that there is no evidence whatever in the record that the engineer or fireman were guilty of causing a wilful or wanton injury to the deceased.

The court should therefore have sustained the motion of appellant to direct a verdict of not guilty on the wilful injury counts; and it was error to refuse to do so under these circumstances.

Error is also assigned on the third and fifth instructions given to the jury at the instance of the appellee upon the question of wilful and wanton injury. These instructions are as

follows:

The Court instructs the jury that ill will is not a necessary element of a wanton act; that to constitute a wanton act, the party doing the act of failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury; that an intentional disregard of a known duty necessary to the safety of the person of another, and an entire absence of care for the life, or person of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness, such as charges the person whose duty it was to exercise care, with the consequences of a wilful injury.

You are further instructed, that, to constitute a wilful injury it is sufficient if it is done under such circumstances as show a reckless disregard for the safety of others, and a willingness to inflict an injury complained of.

Concerning Instruction numbered 3 above set forth, it is pointed out, that there is no such thing as "constructive" or "legal wilfulness." Wilfulness is a matter of fact; and whether or not wilfulness is involved in conduct is a matter of proof; and a jury must infer it from certain facts proven. Both of these instructions which deal entirely with abstract propositions of law concerning wilful and wanton conduct, are subject to the criticism and the errors pointed out by the Supreme Court concerning a similar abstract proposition instruction, given to the jury in the case of *Chicago City Ry Co. v. Jordan* 215 Ill. 390; "This instruction, being based upon no evidence in the case, should not have been given for that reason. But it was also misleading in its nature. It begins with abstract rules which are not objectionable if made clear and properly applied to

a case; but the only application of any rule to this case was to tell the jury that to sustain the count charging the defendants' servants with recklessly, wilfully and wantonly driving the car in question, it was not necessary to prove that the defendants' servants intended to drive the car upon the deceased. They were not told in that or in any other instruction what it was necessary to prove in order to sustain the charge."

For the errors hereinbefore indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

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254 I.A. 825

General No. 8270

Agenda No. 4

JANUARY TERM, A. D. 1929

Leroy Garrett, Appellee.

vs.

The University State Bank of Champaign, a Corporation, Appellant.

Appeal from Champaign.

NIEHAUS, P.J.

In this case the appellee, Leroy Garrett, brought suit in the circuit court of Champaign county against the appellant, The University State Bank of Champaign, to recover damages sustained by him for an alleged malicious prosecution and false imprisonment. The appellee was arrested on the 18th day of November 1927 under a warrant issued by a police magistrate in the city of Champaign upon the the complaint of F. L. Zell, the paying teller of the appellant bank, charging the appellee with having committed a crime of forgery; afterwards on the 29th day of November following a preliminary examination was held, and the appellee was found to be not guilty and was discharged by the magistrate. The proof shows, that the appellee was a member of the Sigma Nu Fraternity of the University; that about October 1, 1927, some one in the fraternity house had obtained possession of checks payable to members of the fraternity, and had forged the names of the payees in the checks and cashed the same at the appellant bank. The checks cashed amount to about \$200.00; and

among them was a check payable to Willard P. Boyson for approximately \$80.00. It was for the forgery of the Boyson check which had been cashed by the appellant bank, that appellee was arrested and imprisoned and held to bail. There was a trial by jury in this case, which resulted in a verdict, finding the appellant bank guilty; and the jury assessed the appellee's damages at \$1000.00; the court rendered judgment on the verdict, and this appeal is prosecuted from the judgment.

It is contended on appeal for reversal of the judgment, that the evidence does not show that Zell the paying teller, had authority from the Bank to make the complaint before the Magistrate charging the appellee with the commission of the crime mentioned, and that therefore the appellant bank is not liable. The appellee was a witness in the case and testified concerning the circumstances under which he was arrested, and concerning the connection of the appellant bank with the matter, as follows: "My name is Leroy Garrett. I am 21 years old. I am a student in the University of Illinois. Have been for three years. Senior class. Live at 303 East John street, at the Sigma Nu Fraternity. Done business at the University State Bank. Kept a deposit in the bank. I am acquainted with the witness Zell. Known him by sight several years. Acquainted with Willard Boyson. He is a member of the same fraternity. Q. Who was present at the University State Bank

when you heard about this Boyson check? A. A detective from the Pinkerton agency and Mr. Hayes. Q. Did you have any conversation there with—what did Mr. Hayes say in regard to this detective? Q. If he said anything? *** A. Why, he said that in this case they would deal with the party who committed forgery in the same manner as in the past, namely, that if the party who forged the checks would give payment thereon, there would be no prosecution, and they would not even tell the University authorities. *** Q. Who said that? A. Cashier of the bank said that. He introduced this detective to me. He said this man—meaning the detective—wanted to talk to me. Hayes was present part of the time when this man talked with me. He left the room and the detective took me to a back room in the bank and Mr. Hayes was not there. He talked with me about an hour. *** The detective merely explained the trouble and then, when Mr. Hayes was not there, he told me I was the man, on the second day—they didn't tell me I did it the first day I was there. On the first day they merely explained the trouble. They said a series of forgeries had occurred and they were suspecting a number of individuals and wanted to interview me concerning the forgeries. I was back the next afternoon. The next day the detective and Hayes were also present. I was there again on November 18th. I came there on telephone call. Mr. Hayes called me. When I got there Hayes and

Rollins wanted to talk with me. Rollins talked with me in two different places; for a short time in the lobby, and then took me to a small room in the back of the bank. I was there several hours. *** I was in the back room an hour and forty-five minutes. Saw Mr. Hayes. Hayes said Zell had identified me as passing the checks, and that Rollins had identified the hand writing as doing it, and unless I would pay for the checks in full, that they would be forced to prosecute me. That was all Mr. Hayes said. I told them I was innocent and would not pay. They left me to wait there, and very soon Mr. Myers came up and took me down to the City building. Q. What was done with you after they got you down to the City building in Champaign? *** A. Why, I was down in the mayor's office, as I remember it, some office there in the court building there—not in the cells—and they were waiting for Mr. Zell to come down and swear out a warrant or complaint. Later in the afternoon that was done and I was formally arrested, and pleaded not guilty and then they said I could use the phone. I tried to find somebody to go on my bond, and every one I knew was out of town to a football game; so they put me in jail, and I had one of the boys from the house come down. He called up Professor Quick and he came down and bailed me out."

The Hayes referred to in the testimony of the appellee, is Bert Hayes, who is the cashier of the appellant bank. He was

called as a witness by the appellee, and was examined with reference to his connection with the matter, as follows: "Q. What was the name of the first detective that worked on this case? ** A. Mr. Sanders. Q. And what Agency was Sanders out of? ** A. Pinkerton Detective Agency. Q. At whose request was he making these investigations? ** A. I did. Q And these check irregularities had to do with the University State Bank? A. Yes. *** Q. At whose request did you send for this detective? A. No one's. Q. And after Sanders got here, did you give him any directions at all as to what to do? A. No sir. Q Who paid for this investigation? A. We get it out of the service belonging to the Association. All the banks that belong to the association, and the University State Bank belongs to the Association."

Hayes when called as a witness for the appellant bank, denied that he requested the appellee to pay any money to the bank by reason of any alleged forged check, but also testified concerning the conversation had with him at the bank as follows: "The conversation I had with him was in view of any person coming in and out of the bank. Had a later conversation with him before the arrest. I was at the desk and Mr. Garrett was in one of the rear conference rooms of the bank with Mr. Rollin. I walked back there and Garrett was sitting there in a chair. I spoke to him

and said, 'Garrett, do you know anything about these checks?' And he said, 'No.' Then Mr. Rollin said, 'Well, Mr. Zell can identify him.' And I said, "Well, Mr. Garrett, if you did this thing, my position in these matters is this—my personal view of these matters—any student during my period as cashier of the University State Bank, with whom I have come in contact in a similar situation, has been, that they have acted in ignorance of what they were doing, and that they did not realize the thing they were doing, and they had probably fallen for the first time"—and then I went out. It seems as though that was the same day he was arrested."

However on cross examination, he was asked the following question: "Q. And you told him that if he did pay that money, that he would not be prosecuted for forgery, didn't you? A. No, not in that way. Q. Was it that in substance? A. No, you have twisted it. I never told him that unless he paid the money he would be prosecuted for forgery. I told McCown that if he wanted to settle the matter, if he did, 'McCown, if you are guilty, my attitude against such things are, not to prosecute, because you are too young a fellow to know what you are doing, but if you will settle the thing, not to me or to the bank, the matter will be dropped.' And that is the same thing I told the plaintiff."

From the evidence referred to, and other evidence in

the record, the jury were warranted in reaching the conclusion that the prosecution of the appellee was carried on with the knowledge and approval and under the direction of the cashier of the bank in whose department of the bank's business, the passing of the forged check upon the bank and the withdrawal of the money from the bank thereby had taken place. And it also appears that it was the cashier as an official of the bank who had set in motion the processes of investigation that resulted in due course in the apprehension arrest and imprisonment of the appellee. The evidence tends to show, that the real purpose in the mind of the cashier in instituting the investigation and the apprehension and imprisonment of the appellee was to procure a return of the money to the appellant which had been illegally withdrawn from the bank and lost by the forged check transaction. And it is a reasonable inference from the evidence, that the act of the bank teller in swearing out the warrant against the appellee constituted merely a link in the chain of procedure carried on concerning the matter referred to, by the direction of the cashier under whom the paying teller was serving in matters pertaining to his department of bank's business. The evidence also justifies the inference that the making of the complaint for the warrant was done in conformity with the general purpose and policy of the bank in such matters as a member of the state organization of banks referred

to in the cashier's testimony. The officers having charge of the business of a corporation or some department thereof are the agents of the corporation for the purpose of the transaction of the business of the corporation, and all matters connected with or pertaining to such business. "When an act pertaining to the business of a corporation which is not foreign to the corporate powers is done by an officer within his department it will be presumed to have been done with the consent of the corporation." **Merchants National Bank v. Nichols & Co.** 323 Ill. 41; **Bank of Minneapolis v. Griffin** 168 Ill. 314; **Anderson Transfer Co. v. Fuller** 174 Ill. 221; **American Hominy Co. v. Bank of Decatur** 294 Ill. 223; **Vrchotka v. Rothchild** 100 Ill. App. 268; **Gallagher v. Singer Sewing Machine Co.** 177 Ill. App. 198. In view of the principles laid down in the foregoing authorities we conclude, that it was not a necessary element of proof to sustain the appellee's right of recovery that express authority should have been shown to have been conferred upon the cashier as an officer of the bank, to act in the matters involved in this controversy. We find no reversible error in the record, and judgment is therefore affirmed.

Judgment affirmed.

abet

June 11-1929

10 a

7

General No. 8277

Agenda No. 7

JANUARY TERM, A. D. 1929

Lantie Underwood, Appellee.

vs.

W. V. Deahl and Ethel Deahl, Appellants.

254 I.A. 625²

Appeal from Clark.

NIEHAUS, P.J.

In this case, the appellee Lantie Underwood, filed a bill in chancery to set aside an alleged fraudulent conveyance of property, so as to give effect to an execution issued upon a judgment for the sum of \$2073.37 recovered against the appellant W. V. Deahl, which was levied upon certain real property described in the bill; and other relief is prayed for in the bill. The bill makes the following averments:

Your Orator, Lantie Underwood of Clark County, Illinois, respectfully represents that on the 10th day of November 1926, your orator recovered a judgment in the Circuit Court of Clark County, Illinois, against A. H. Hix, W. V. Deahl, Lucille Hix, A. D. Swope, and C. M. Hix for the sum of Two Thousand Seventy three Dollars and thirty seven cents (\$2073.37), damages and costs of that suit.

And your Orator further represents that said judgment was to date from the 26th day of September, 1925, the date upon which the original judgment by confession was entered in said Court, whereof the said A. H. Hix, W. V. Deahl, Lucille Hix, A. D. Swope and C. M. Hix stand convicted; as by the record of the said judgment in the office of the Clerk of said Court, reference thereto being had, will more fully appear.

Your Orator further represents, that previous to the rendition of said judgment the defendant W. V. Deahl was the owner in fee simple of certain real estate situated in the County of Clark and State of Illinois, described as follows, to-wit:

The West Half ($\frac{1}{2}$) of the following described tract of land, commencing at the center of the road ten (10) chains East of the Northwest corner of the Southwest Quarter ($\frac{1}{4}$) of the Southeast Quarter ($\frac{1}{4}$) of Section Six (6), in Town Ten (10) North, Range Thirteen (13) West, thence East 2000 links to within Two (2) feet of a stone; thence South 1151 links; thence West 1440

links to the center of the road, in a Northwesterly direction to the place of beginning, containing Twenty (20) acres more or less, situated in the City of Martinsville.

Also the undivided one half interest in Twenty (20) feet from and running the same width and South One Hundred Fifty Five (155) feet to an alley off the East side of the West half (1/2) of Lot Number Thirty Four (34) of the Original Town, now City of Martinsville, all in Clark County, Illinois.

And your Orator further represents that the said W. V. Deahl was also the owner and in possession of certain personal property not exempt by law from execution, to-wit: a stock of goods and fixtures used in operating a restaurant in the City of Martinsville, Clark County, Illinois, and household goods.

Your Orator further represents that on the 20th day of December, 1926, the said judgment remaining in full force and effect, the damages and costs aforesaid unsatisfied, your Orator for the purpose of obtaining satisfaction of the same caused an alias execution to be issued and delivered to the Sheriff of said County of Clark, where the defendants W. V. Deahl then resided and still resides, and the said real estate is situated, in the usual form commanding the said Sheriff that of the goods and chattels, lands and tenements of the defendant W. V. Deahl in his County he should cause to be made the sum of Two Thousand Seventy Three Dollars and thirty-seven cents (\$2073.37), which your Orator in the said Circuit Court recovered against the said A. H. Hix, W. V. Deahl, Lucille Hix, A. D. Swope, and C. M. Hix, and he should have the money at the Clerk's office of said Court at Marshall in said county, in ninety days from the date thereof, to satisfy the judgment so recovered by your Orator as aforesaid, and that he should have then and there that writ; which said writ of fieri facias was duly endorsed, and on the same day delivered to the said Sheriff to be by him executed in due form by law.

And your Orator further represents that said Sheriff on the third day of March, 1927, duly levied said execution upon the said above described real estate.

Your Orator further represents that prior to the rendition of said judgment, but after the indebtedness upon which the same was rendered had accrued, to-wit: on the 15th day of September, 1925, the defendant W. V. Deahl made a pretended conveyance in fee of the said described real estate to his wife, Ethel Deahl, another Defendant hereinafter named, for a pretended consideration of One Dollar (\$1.00.)

And your Orator further represents, that the said conveyance was not real, but was a mere sham and made with the intention of defrauding your Orator and the other creditors of the said W. V. Deahl out of their just demands; that no consideration was paid by the said Ethel Deahl to W. V. Deahl for the said conveyance; and that the said premises are now held by the said Ethel Deahl in trust for the said W. V. Deahl and for his use and benefit and for the purpose of preventing a levy and sale of the same under and by virtue of said execution.

Your Orator further represents that the said W. V. Deahl is a man of no pecuniary responsibility, and is possessed of little or no property other than that so fraudulently conveyed by him as aforesaid, and is in embarrassed circumstances, and involved and largely in debt.

And your Orator further represents that on the said 15th day of September 1925, being the day that the

defendant W. V. Deahl conveyed the above described real estate to his said wife, Ethel Deahl, the said W. V. Deahl, by a bill of sale assigned and transferred to his said wife, Ethel Deahl all his stock of merchandise and everything included in the restaurant which he was operating or conducting in the City of Martinsville, Illinois, and also including his household goods.

Your Orator further represents that said 15th day of September 1925 the said W. V. Deahl and Ethel Deahl his wife, by the mortgage deed conveyed to V. L. Cole the above described real estate to secure a loan of Thirty Five Hundred (\$3500.00) Dollars.

And your Orator further represents that the said W. V. Deahl has no personal nor real estate liable to levy and sale, except the premises aforesaid, on which the said Sheriff could make a levy and realize the amount of the said judgment and costs; and that although the said Sheriff has frequently demanded of the said W. V. Deahl to pay the amount upon the said judgment, or that he turn out property on which he could make a levy, the said W. V. Deahl has refused to pay the same or turn out property, and fraudulently insists that he has neither money nor property to satisfy the same.

Your Orator further represents neither of the said A. H. Hix, Lucille Hix, A. D. Swone and O. M. Hix against whom the above judgment was taken, is possessed of little or no property, and are in embarrassed circumstances and involved and largely in debt.

Your Orator further represents that at the time the first W. V. Deahl fraudulently conveyed said real estate to his wife, both he and his wife well knew that the said W. V. Deahl was indebted to your Orator, and your Orator is informed that the said W. V. Deahl and Ethel Deahl stated at the time that the conveyance was made that it was expressly made for the purpose of preventing your Orator from collecting said indebtedness.

Your Orator further represents that the said judgment still remains in full force and effect, nor reversed, satisfied or otherwise vacated; that there is now actually and equitably due your Orator upon the same the sum of Two Thousand Seventy Three dollars and Thirty Seven cents (\$2073.37) together with interest thereon from the September 26th, 1925, over and above all claims of the said W. V. Deahl by way of set off or otherwise.

The appellants W. V. Deahl and Ethel Deahl are the only parties defendant in the bill; the bill prays, that the alleged conveyance transferring the title to the premises in question, which is alleged to have been fraudulent, from W. V. Deahl to Ethel Deahl, be set aside vacated and declared null and void; and that the appellee be authorized to proceed with his writ of fieri facias; and

that the sheriff be directed to proceed to advertise and sell said premises for the payment and satisfaction of appellee's judgment interest and costs.

After hearing the evidence, the court made a finding in the decree rendered, that prior to the rendition of appellee's judgment, but after the indebtedness for which the same was rendered had accrued, the appellant W. V. Deahl made a pretended conveyance in fee of said described real estate to his wife, Ethel Deahl, for a pretended consideration of \$1.00; and that said conveyance was not real, and was made with the intention of defrauding the appellee and other creditors of the appellant W. V. Deahl out of their just demands; and that no consideration was paid by said Ethel Deahl to the appellant W. V. Deahl for said conveyance, which was a controverted question of fact in the case. The court also found, that the said premises are now held by said Ethel Deahl in trust for the appellant W. V. Deahl; and for his use and benefit; and for the purpose of preventing a levy and sale of the same on and by virtue of the execution referred to; and the court thereupon ordered adjudged and decreed, that the deed of conveyance to Ethel Deahl made and executed by the appellant W. V. Deahl for the premises de-

scribed in the bill be set aside and vacated and declared null and void and of no effect whatever against the appellee Lantie Underwood; and further ordered adjudged and decreed that the appellee be authorized to proceed upon his writ of fieri facias issued upon his judgment referred to, or to issue another writ of fieri facias thereon, etc. The court also finds, that on the 20th day of December, 1926, said judgment being in full force and effect the appellee for the purpose of obtaining satisfaction of the same caused an alias execution to be issued and delivered to the sheriff of the county of Clark; said execution being in the usual form, and commanding the said sheriff, that out of the goods and chattels lands and tenements of the appellant W. V. Deahl he should cause to be made the sum of \$2073.37; and that on the 3rd day of March 1927 execution was duly levied upon the above described real estate. There is an averment of the bill of complaint, however, that after the conveyance by the appellant W. V. Deahl to his wife, Ethel Deahl of the real estate described in the bill of complaint, on the 15th day of September 1925, the appellant and his wife on the same day by mortgage deed conveyed the same real estate to one V. L. Cole, to secure a loan of \$3500. There is no averment in the bill of complaint, that the conveyance to V. L. Cole is fraudulent; and the answer of the appellants admits that the conveyance to

Cole by mortgage deed was to secure a loan of \$3500.00; and the evidence tends to show, that the conveyance by mortgage deed to V. L. Cole was made to secure a loan of \$3500.00 and made by Cole in good faith. It is apparent, in this state of the record, that the legal title to the premises in question for the purposes of the mortgage conveyance is in V. L. Cole; and that the finding of the decree, that the title is held by Ethel Deahl in trust for her husband, and for his use and benefit, is erroneous. And it is evident, that no finding to set aside and vacate the conveyance by the appellant W. V. Deahl to Ethel Deahl as fraudulent could be made without affecting the rights and interest of V. L. Cole in the premises by virtue of his mortgage; and no adjudication affecting the legal title of the premises could be made concerning the rights of the appellee under the lien of the execution issued upon his judgment, which is found to be a lien upon the premises without affecting the rights and interests of Cole under his mortgage deed; and that Cole is therefore a necessary party to this proceeding; and should have been made a defendant therein. It is true, that no objection was made for want of necessary parties in the court below; nor was there any objection made on that ground to the decree in this court. But it is well settled that in a chancery proceeding, "whenever it appears, that a party has been omitted whose presence is so indispensable to a

decision of the case upon its merits, that a final decree cannot be made without materially affecting his interest, the objection not only may be taken by the opposite party at the hearing on appeal or error, but the court will take notice of such omission of its own motion and rule accordingly." **Webster v. Jackson** 304 Ill. 569; **Gerard v. Bates** 124 Ill. 150.

For the reasons stated the decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Abet

Nov 21-1929

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254 I.A. 625³

General No. 8295

Agenda No. 10

JANUARY TERM, A. D. 1929

The People of the State of Illinois, Defendant in Error.

vs.

Ora Williams, Plaintiff in Error.

Error to County Court of Pike County.

NIEHAUS, P.J.

The Plaintiff in Error Ora Williams, was convicted on two counts of an information filed against him for violations of the Prohibition Act, that is to say, for having illegal possession of intoxicating liquor. The information against the Plaintiff in Error was filed in the county court of Scott county. He entered a plea of not guilty to the charges contained in the information, and afterwards filed a petition for change of venue on account of the alleged prejudice of the county judge of that county. The prayer of the petition for change of venue was granted, and thereupon the venue was changed to the county court of Pike county, where the case proceeded to trial; and resulted in the conviction of the plaintiff in error in that county. Before the trial, the plaintiff in error filed a plea in abatement, objecting to the jurisdiction of the county of Pike county to try him. The People demurred to the plea in abatement, and demurrer was sustained; whereupon the plaintiff in error was again arraigned and pleaded not guilty, and the cause thereupon proceeded to trial.

The only question raised for review concerns the matter of the jurisdiction of the county court of Pike county to try the plaintiff in error after the change of venue from Scott county. It is insisted and strongly contended that notwithstanding the change of venue, the county court or some other legally competent court of Scott county only had jurisdiction to try the plaintiff in error under Section 9 of Article 2 of the Constitution, which provides that "in all criminal prosecutions the accused shall have the right to *** a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." It is sufficient however, to point out that the plaintiff in error by his application for a change of venue waived his right to a trial by a jury of the county in which the offense is alleged to have been committed. The Statute under which the application for change of venue was made is as follows: "Section 18. When any defendant in an indictment or information in any court in this state shall fear, that he will not receive a fair and impartial trial in the court in which the case is pending, because the judge of the court is, or the inhabitants of the county in which the case is pending are prejudiced against him, the court shall award a change of venue upon the application of the defendant as hereinafter provided." And Section 19 provides: "When a change of venue is granted, it may be to some

other court of record of competent jurisdiction in the same county, or in some other convenient county to which there is no valid objection; Provided, that when the case is pending in the criminal court of Cook county, and the cause for the change of venue applies only to a judge of said court, holding the court at the time of the trial, the case may be tried by any other of the judges of said court to whom the cause alleged does not apply." Sec. 18 and 19, Chap. 146, Smith-Hurd Illinois Revised Statutes.

This information having been filed in the county court of Scott county, the county court of that county was the only court of competent jurisdiction in that county to try the case. It could not legally be tried in the circuit court. **Swanson v. People** 89 Ill. 589. It was therefore incumbent upon the county court under Section 19 of the Change of Venue Act above quoted to transfer the case to some other County Court in some other convenient county to which there was no valid objection. Pike County was obviously a convenient county within the meaning of the Act, inasmuch as it adjoins the county of Scott. It is apparent that the change of venue was made in conformity with the provisions of the Change of Venue Act; and that by making the application for change of venue the plaintiff in error waived his right to be tried in Scott county. In **Weyrich v. The People** 89 Ill. 90, the Supreme Court, referring to the question here involved and the right of a trial by jury in-

the county where the offense is alleged to have been committed, said: "The right secured by this clause (meaning the clause referred to, in the Constitution) is one that the defendant may waive; and the plaintiff in error here, when she petitioned for a change of venue, did waive it. **Perteet v. The People** 70 Ill. 171; **Rafferty v. The People** 72 Id. 37; **Bedee v. The People** 72 Id. 321, are cases where convictions on the change of venue were sustained, and in which, had we not held that the court to which the venue was changed had jurisdiction, the ruling could not have been as it was. But the court has also held, that the defendant is entitled to a change of venue, on a proper showing, as a matter of right, which would be utterly absurd if the petition did not waive the right of trial in the county or district in which the offense is alleged to have been committed."

We conclude therefore, that the venue which was changed on the application of the plaintiff in error, from the county court of Scott county was properly changed to the county court of Pike county; and that the county court of Pike county had jurisdiction to try the plaintiff in error upon the charges preferred against him; and that the judgment of conviction should therefore be affirmed.

Judgment affirmed.

254 I.A. 625⁴
General No. 8304
Agenda No. 13
January 11, 1929
Relinquishing Affidavit
October 9 - 1929

General No. 8304

Agenda No. 13

JANUARY TERM, A. D. 1929

Carrie Greenway, John Wake, Lizzie Wake, William
Wake, Mary Slater, Anna Cooper, Martha Behl,
S. P. Doyle, and Fred Doyle, Appellants.

vs.

Frederick W. Beck and Frederick W. Beck, Execu-
tor of the Last Will and Testament of Chris
Beck, deceased, Appellees.

Appeal from Christian

NIEHAUS, P.J.

This is an action of assumpsit commenced by the appellants, Carrie Greenway, John Wake, Lizzie Wake, William Wake, Mary Slater, Anna Cooper, Martin Behl, S. P. Doyle and Fred Doyle, in the circuit court of Christian county, against the appellees, Frederick W. Beck, and Frederick W. Beck as executor of the Estate of Chris Beck, deceased. The appellants seek to recover damages for an alleged breach of a written contract entered into by the parties with Chris Beck, deceased, in his life time. The contract is as follows:

This agreement entered into this.....day of..... 1924, between Chris Beck, party of the first part, and Fred Doyle, S. D. Doyle, Martha Behl, Anna Cooper, Mary Slater, William Wake, John Wake, Lizzie Wake and Carrie Greenway, parties of the second part witnesseth:

Whereas, the parties of the second part are contemplating filing an action for an accounting against the said Chris Beck in the Circuit Court of Christian County, Illinois, and

Whereas, it is the desire of the parties hereto that all matters involved in the said accounting suit or any other suit or cause of action be adjusted out of Court, therefore the parties of the second part, in consideration of the promises and covenants of the party of

the first part, promise, covenant that they will not begin, commence, maintain or prosecute any cause of action whatsoever, either in law or equity against the said Chris Beck in any court during the life time of the said Chris Beck and that a certain suit for accounting now on file in the Circuit Court of Sangamon County, Illinois, shall have no further prosecution so far as the parties of the second part are concerned; the party of the first part, in consideration of the promises and covenants of the party of the second part, promises and covenants that he will make provisions in his last will and testament wherein, he, the party of the first part, will give, devise and bequeath to each one of the parties of the second part property, real or personal, of the value of not less than five thousand (\$5,000) Dollars.

It is further agreed by the parties hereto that any of the parties to this agreement who shall fail to keep the terms set forth herein shall be liable to the party injured thereby for all costs and attorney fees in maintaining this agreement.

Witness our hand the day and year set forth above.

	his
	Chris X Beck
Witness to Mark	Mark
E. M. Flynn	Party of the first part.
	Fred W. Doyle
	S. P. Doyle
	Martha Behl
	Anna Cooper by Carrie Greenway
	Mary Slater their agent
	Wm. Wake
	Lizzie Wake
	John Wake
	Carrie Greenway
	Parties of the second part.

The **ad damnum** clause of the declaration fixes the joint damages of appellant at \$60,000.00. A demurrer was sustained to the declaration because it avers a joint liability and claims a joint right of the appellants as parties plaintiff to recover in the action; and the only question presented for review on appeal is whether the liability incurred by the breach of the contract in question, is joint, or several.

The appellants contend that inasmuch as the contract made by the deceased was made jointly with all of them, that there-

fore right of recovery is also joint. A Joint contract may be made however with several parties which results in separate and distinctive obligations to one or more, or all of the joint parties to the contract. The mere fact that the parties to the contract may have had a unity of interest in the subject matter of the action does not make the right of recovery joint, if there is no unity of interest in the relief or recovery sought. **Keery v. Mutual Reserve State Life Ins. Co.** 30 Fed. 359.

Nor does the fact, that the separate rights of different plaintiffs have all arisen simultaneously, or out of one act of the defendant per se warrant a joinder of the parties; and this rule holds good even where the contract as to each plaintiff is evidenced by the same instrument. There must be also a community of interest in the relief demanded. 30 Cyc 114-115. 'Where a contract has been made with several parties under which a separate duty arises as to each, in contemplation of law, it is, the same as if a separate and distinct contract had been entered into with each separately; and they must therefore sue separately. 20 R. C. L. 674. And where for instance the promise is made to pay to several persons though in equal proportions, and it was not intended that they should receive or recover the entire sum and divide it each must bring a separate action. **Owings v. Owings** 1 Har. & G. (Maryland) 484. 15 Ency. of Pleading and Practice, 536.

In the present case the contract entered into by the appellants was jointly entered into by all the appellants; but the obligations incurred by the deceased party thereto, and the rights acquired thereunder by the appellants were distinctly several to each of them. By the contract the deceased agreed to "give to each one of the parties *** property real or personal of the value of not less than Five Thousand (\$5,000.00) Dollars." And the severalty of the obligation is also emphasized by the last clause of the contract where it is agreed, "that any of the parties who shall fail to keep the terms set forth herein shall be liable to the party injured thereby for all costs and attorneys fees."

Where there is no joint interest in the subject matter to be recovered, there can be no joint action at law. **Moore v. Turhune** 161 Ill. App. 155; **Brady v. Kuntz** 145 Ill. App. 582; **Dix v. Mercantile Mfg Co.** 22 Ill. 272; **Frye v. Bank of Illinois** 5 Gil. 332; **Steritt v. Goff** 165 Ill. 99; **Snell v. DeLand** 43 Ill. 323.

It is further pointed out, that the assumpsit involved in this case is the breach of contract from which the law implies a promise to pay. No promise to pay could legally be implied from the breach of the contract in question to pay to the appellants jointly the full amount of all the separate claims which accrue to each of them under the terms of the contract. The only implication

which could reasonably arise as a matter of law is to pay to each of the appellants the damages incurred by each, on account of the failure of the deceased to carry into effect the contract he made.

For the reasons stated, we conclude that there was no joint right of action, and that therefore the demurrer was properly sustained to the declaration. The judgment is affirmed.

Judgment affirmed.

General No. 8209

254 I.A. 625⁵
Agenda No. 6

APRIL TERM, A. D. 1928

Illinois-Indiana Fair Association, Appellee,

vs.

Louis Deutsch, Albert Deutsch, Robert Deutsch, Ray
Deutsch, Copartners Doing Business under the
Name and Description of Deutsch Brothers,
Appellants.

Appeal from the Circuit Court of Vermilion County
SHURTLEFF, J.

Appellee brought suit against appellants in the
Vermilion County Circuit Court upon the following
promissory note, executed by appellants:

"\$1000.00

Danville, Illinois,
Oct. 20, 1919.

"For value received I promise to pay to the or-
der of Illinois-Indiana Fair Association, at their of-
fice in Danville, Illinois, one thousand dollars, with
interest from November 1st, 1919, at the rate of 6 per
cent payable annually on November 1st of each year,
on deferred payments. Principal payable annually as
follows:

\$200.00 on November 1st, 1920; \$200.00 on No-
vember 1st, 1921; \$200.00 on November 1st, 1922;
\$200.00 on November 1st, 1923. Balance, November
1st, 1924, and if not paid when payment become due,
a reasonable attorney's fee to be added to the principal
thereof.

Deutsch Bros.,
Per Lou Deutsch."

To the declaration appellants filed seven special pleas, the fifth and sixth pleas being withdrawn.

The first plea is in the ordinary form and pleads want of consideration.

The second plea charged that the note was not delivered to the Fair Association but to one John Hartshorn, and that said Hartshorn and the defendants and one hundred thirty-three other persons had entered into the contract set forth, and that the Fair Association was not a party to the contract; that the appellants did not authorize the said Hartshorn to deliver the note mentioned, and pray judgment, etc. To this plea a general demurrer was sustained.

The third plea alleges that the note was made in pursuance of the following written agreement:

“For and in consideration of the signatures and agreements of each of the parties signing this agreement agrees with the others as follows:

“That the parties signing this agreement hereby underwrite the sale of \$135,000.00 of capital stock of Illinois-Indiana Fair Association, a corporation, to be sold by said association for the purpose of further financing the same.

“It is agreed that said stock shall be 5,400 shares of the par value of \$25.00 per share, and shall be fully paid up and nonassessable, and shall consist of the unsold stock of said association as now authorized, together with such increase of the same as may be necessary to make up the balance of said \$135,000.00 of capital stock so to be sold; and the parties hereto waive notice of stockholders’ and directors’ meetings of said corporation necessary to increase the capital stock of the same.

"It is understood and agreed, by and between the signers of this agreement, that each signer shall join with Illinois-Indiana Fair Association and any others, assisted by the Chamber of Commerce of Danville, Illinois, in a campaign to last at least thirty days, to sell said \$135,000.00 of capital stock of said association, it being the intention and purpose of said Illinois-Indiana Fair Association and the parties hereto to have said stock distributed as widely as possible, that when the stock-selling campaign is over, the balance of said \$135,000.00 of capital stock remaining unsold, if any, shall then be purchased by the signers hereof, each signed to purchase and pay for his pro rata share only of the balance then remaining unsold, at the rate of \$25.00 per share. It is agreed, however, that in no event shall any signer of this agreement be required to purchase and pay for more than forty shares of said capital stock, and this agreement shall not be binding upon the parties until signed by one hundred thirty-five persons.

"It is further agreed that in the event the signers of this agreement are by it required to purchase any stock remaining, as herein mentioned, they shall have the right to pay for same at the rate of \$200.00 per year by giving their notes with interest at 6 per cent per annum from date of such purchase."

The said agreement was fully signed and executed before June 10, 1919; that the note mentioned in the declaration was made in pursuance of said written agreement and as the purported consideration for forty shares of stock of the Fair Association, and that said stock came within the provisions of stocks under the Blue-sky Law of 1917; that at the time of such agreement the Fair Association had no license or permit to sell any securities,

and that there was no other consideration for the note; whereby the note was at all times void. A general demurrer was sustained to this plea.

In the fourth plea defendants say plaintiff ought not to have its action because the supposed note mentioned was not delivered to the plaintiff and was not made by reason of any contract or agreement with the plaintiff, but that said note mentioned in the declaration was made in pursuance of a certain contract or agreement in writing, made between the defendants and one hundred thirty-four other individuals (same as the agreement set out *supra*.)

And defendants further aver that Illinois-Indiana Fair Association never did at any time after the making of said agreement or at any time prior to or after the said supposed promissory note mentioned in the declaration legally and in compliance with the Statutes of the State of Illinois increase its capital stock in the amount to enable it to sell one hundred thirty-five thousand dollars of additional capital stock, and that said one hundred thirty-five signers of said agreement in writing above mentioned and the Illinois-Indiana Fair Association and the Chamber of Commerce of Danville, Illinois, did not carry on a campaign lasting thirty days to sell one hundred thirty-five thousand dollars worth of capital stock of said Illinois-Indiana Fair Association, and that these defendants at all times were ready and able to join in said campaign for the sale of stock as provided in said written agreement, and at all times at the time of the making of said note relied upon the performance of said conditions of said written agreement, and that the conditions contained in said written agreement have never been complied with; wherefore, these defendants say that the consideration upon which said note was made, has wholly failed, and this they are ready to verify, etc.

The seventh special plea charged that the note was made in pursuance of the written agreement above mentioned and set forth, and that there was no other consideration whatever for said note; that said contract constituted an underwriting agreement between the individuals signing the same, and that there was no agreement between the plaintiff and the defendants that said note was to represent liquidated damages, and that there was no contract on the part of the defendants to purchase the Fair Association stock, etc. A general demurrer to the seventh special plea was sustained by the court. Appellants elected to stand by their second, third, fourth and seventh pleas. There was a replication to the first plea, issue made to the country, proofs heard by the court, a finding and judgment for appellee, and appellants have appealed. The only error assigned or argued is the Court's action in sustaining the demurrer to the second, third, fourth and seventh pleas. The second plea, in so far as it pleaded a want of consideration, was covered by the first plea, upon which proofs were submitted. Where a party has the same benefit under a plea as to the introduction of evidence that he would have had as to another plea to which a demurrer is sustained, it is not reversible error to sustain the demurrer, since he has not been prejudiced (*Harrison v. Thackaberry*, 248 Ill. 516.)

The second plea is not a good plea as to the non-delivery of the note. The delivery of the note is a part of its execution and under the statute the plea must be verified (*Bailey v. Valley Nat. Bank*, 127 Ill. 340; *Bippus v. Vail*, 230 Ill. App. 633.)

The defense attempted to be made under the "Blue-sky Law" by the third plea cannot prevail, because it is not alleged or claimed that the appellee had not qualified its stock for sale under the "Blue sky Law" on October 20, 1919, when the note was received by it for the stock purchased, but the allegation of the third plea is that the appellee had not qualified its stock for sale when the one hundred thirty-five persons entered into the agreement mentioned on June 10, 1919. It is entirely imma-

terial whether or not the stock of appellee was qualified for sale when these outside parties entered into said agreement. The appellants concede that the appellee was not a party to that agreement. Therefore, it was not reasonable for it, and its only legal obligation was to qualify its stock for sale before it sold the stock to the appellants, when the note was taken on October 20, 1919.

It is insisted by appellant that the demurrer being general the fourth plea states a good defense of failure of consideration differing from the first plea of want of consideration, and that the demurrer should have been overruled, citing **Stace Adm'r. v. Baker**, 1 Seam, 417; **Knapp Stout & Co. v. Ross**, 181 Ill. 393, and **Reece et al, v. Smith**, 94 id. 362. This suit is not brought upon the contract set out and executed prior to June 10, 1919, but the suit is brought upon the note. So far as the plea alleges that the note was not delivered to appellee, it is ineffective because not verified. So far as it purports to be a plea of failure of consideration, it is not effective, for the reason that the plea does not pretend to set out what the consideration of the note was. The plea simply alleges that the note was made in pursuance of the so-called underwriting agreement, but no where in the plea is it averred that the underwriting agreement was the consideration of this note and that there was no other consideration, or that the agreement was the only consideration. The plea avers that the note was not made by reason of any contract or agreement with appellee, and it follows that appellee could not have been a party to the underwriting agreement and none of the matters set up constituted a consideration of any kind accruing from appellee which could fail. In order for a consideration to fail, there must first be a consideration or a pretended consideration which can fail.

In **Honeyman, etc. v. Jarvis, etc** 64 Ill. 371, it is held: "The rules deducible from the cases cited are, that to constitute a good plea of failure of consideration under the statute, the pleader must set out what the consideration was and specify wherein it has failed;" and in **Hough v. Gage**, 74 Ill. 258, the court held: "All the elements entering into the consideration must be set forth and a failure of each and every part of it distinctly averred." And in **Sheldon v. Lewis**, 97 Ill. 642, the court said: "In a plea of failure of consideration it is necessary to set up what the consideration was and then aver wherein the consideration has failed," and the authorities are numerous holding to that rule. In 8 Corpus Juris, page 921, under the subject of "Bills and Notes," it is stated by the author that "The plea should allege the actual consideration and that there was never any other."

For appellant to aver some contract made between himself and one hundred thirty-four others, not including appellee, does not in any manner purport to aver a consideration or pretended consideration, accruing from appellee, which had failed. The plea does not negative some other possible consideration accruing from appellee. The plea could not by inference be construed as averring anything other than a want of consideration, as alleged in the first plea. Before a failure to perform the things to be done under the so-called underwriting agreement could be urged as against appellee, it would have to appear that in some way appellee made itself a party to the performance of those things, and bound itself to perform them, and this was not done by the fourth plea. The only contractual relation between appellants and appellee which could possibly appear from this plea was the making of the note in question, and appellants in their plea even deny that the note was delivered to appellee. It is not averred

in this plea that appellants and appellee had assumed any contractual relation until the note in question was executed to appellee by appellants. The carrying on of the selling campaign for thirty days was wholly a matter of agreement between appellants and the other signers of the agreement, and appellee was not a party to that agreement. If the campaign was not carried on for thirty days then that was a matter that appellants could have contended against other signers of the agreement as a reason for not purchasing their pro rata of unsold stock and paying for the same with their note.

The fourth plea was defective in substance and the demurrer to it was properly sustained.

What we have said as to the fourth special plea applies with equal force to the seventh special plea and the allegations in this plea amounted to no more than an attempt to aver an entire want of consideration. It was defective in substance and the demurrer was properly sustained.

The suit is not brought upon the contract set out and executed prior to June 10, 1919, but it is brought upon the note. All of the additional matters set out in the second, fourth and seventh pleas go to the consideration of the note, and any testimony admissible under said pleas was also properly admissible under the first plea, upon which issue was formed and proofs submitted. Inasmuch, therefore, as the pleas were defective in substance, and appellants were not prejudiced, there can be no reversible error (**Treman v. Morris**, 9 Ill. App. 239; **Blanchard v. L. S. & M. S. Ry. Co.**, 27 Ill. App. 22.)

Upon the trial of the cause appellants submitted no proofs.

The judgment of the Circuit Court of Vermilion County is therefore free from error and should be affirmed.

Judgment affirmed.

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Oct 9 - 1929

254 LA. 326

General No. 8289

Agenda No. 39

OCTOBER TERM, A. D. 1928

C. E. Andrews, Appellant,

vs.

C. A. Thrift, Appellee.

Appeal from County Court, Macon County.

SHURTLEFF, J.

Appellant filed his petition in the County Court of Macon County on February 7, 1928, with a motion to show cause and affidavit against appellee, sheriff of said county, said petition reciting various proceedings: the entry of a judgment by petitioner (appellant) in said court against one Ernest F. McCabe on February 7, 1927; the issuance of an execution upon said judgment and placing the same in the hands of appellee, the legal and duly qualified sheriff of said county; the service of said execution upon the judgment debtor; and the making of a levy and seizure of a Chrysler automobile by appellee as such sheriff upon the said execution as the property of said judgment debtor, etc. The petition sets out various proceedings—a petition by McCabe, judgment debtor, to open and vacate said judgment, and an order entered by the court on June 16, 1927, that the judgment be hereby opened, execution stayed and leave to plead granted. The petition shows various proceedings had in said court, in a trial of the right of property over said automobile, the return of said execution by appellee stating: "Returned no property found whereby I can cause to be made the within debt and costs or any part thereof this 7th day of May, 1927." Said petition, after setting out further allegations and charges, demanded a rule upon appellee under section

16 of chapter 125, Reviser Statutes, that he show cause why he should not be adjudged in contempt of court for disobeying the writ of said court and liable to pay appellant, aggrieved thereby, damages. Appellee filed an answer denying the validity of appellant's judgment and denying that McCabe, the judgment debtor, was the owner of said automobile. Various others matters of defense are set out, all of which were under oath and sworn to by appellee. Appellee's answer was stricken and thereafter appellant amended his petition, filed amended petitions and thereafter filed amendments to the amended petitions. A like course was followed with the answer, all of which appears in the abstract and briefs with little or no attempt by either party to segregate or set out the petition or answer in its present form and we are compelled to go to the record to attempt to get an understanding of the real issues in this case. The judgment claimed to have been entered by confession on February 7, 1927, came to an apparent conclusion on January 4, 1928, by an order entered in said cause in the County Court of Macon County in case No. 2965 as follows:

"On the 4th day of January, 1928, same being one of the regular judicial days of the December Term, 1927 of said court, came C. E. Andrews, plaintiff, and C. N. Weillepp, attorney for the defendant and by agreement between the plaintiff and attorney for defendant, a remittitur on said judgment, in the amount of \$19.02, was allowed, said original judgment, however, together with the execution and proceedings thereon to stand, subject to said remittitur only.

"Said judgment to stand as of the date originally entered, subject to all the rights attaching under said original judgment, the original judgment to be restored, and stay of execution thereon removed and set aside, and the lien of original execution preserved, and being modified only to the extent of said remittitur."

Other and further issues than we have recited are set out by amendment to the petition, and the petition and answer were heard before the court without proofs on May 17, 1928. An order was entered finding that appellee, C. A. Thrift, (defendant) be, and he is hereby purged of contempt on his answer, from which order petitioner has appealed.

Appellee further in his answer denied various allegations in the petition, and set out that all of the proceedings under said execution were conducted by a deputy sheriff and not by appellee, and that the title to said automobile was disputed "as appellant well knew," and that the right and title of the judgment debtor to said automobile was not clear and undisputed.

The answer further averred that appellee had in no manner disobeyed or intended to disobey or neglect the writ of the court, and the answer was sworn to by appellee.

It further appears from the pleadings that in December, 1926, two months prior to the entry of the judgment in question, the McCabe used car exchange by E. F. McCabe, President, who was also the judgment debtor, had sold the car in question upon a conditional sales contract to one Macie McCabe, wife of the judgment debtor, taking therefor a judgment note for the sum of \$676.92, payable in installments of \$56.41 per month and a conditional sales contract, which contract and note had been endorsed and assigned over in writing prior to the entry of said judgment by the McCabe used car exchange to one H. H. Missick of Charleston, Illinois, and in this manner the title stood at the time of the entry of said judgment and the issuing of said execution.

The statute under which this proceeding is brought provides as follows: "The disobedience of any sheriff to perform the command of any writ, warrant, process, order or decree, legally issued to him, shall be deemed a contempt of the court that issued the same and may be punished accordingly; and he shall be liable

to the party aggrieved for all damages occasioned thereby."

The section of the statute in question plainly covers two subject matters and provides for two independent actions. In the first part of the section a provision is made providing for a criminal contempt, for disobedience to perform any command or writ and fixing a penalty therefor. This in no manner is intended to pecuniarily aid a suitor. The second part of the section provides: "and he (the sheriff) shall be liable to the party aggrieved for all damages occasioned thereby." This part of the section gives a suitor a civil action against the sheriff for all damages occasioned by his disobedience. The subject is discussed in **Beaird v. Foreman**, Scammon Vol. 1, at page 40, and section 14 of the Sheriff's Act discussed in that case, conforms more nearly to section 23 of the present act. But this is not a case where the sheriff unreasonably neglects to pay any money collected. **Beaird v. Foreman**, *supra*, went to the Supreme Court on a writ of error. **Buckmaster v. Drake**, 10 Ill. 321, was a proceeding under the Practice Act against the sheriff for unreasonably neglecting to turn over money collected under another statute. Appellant has proceeded upon the theory that under the section in question the court could give him summary relief for the amount of his execution. This is a misconstruction of the meaning of the act. That the Criminal contempt could be judged, at any time, by satisfaction of the civil damages, is without question, but we do not hold that a court of common law, can summarily hear a cause for contempt, as a civil case, determine the damages and order restitution, which apparently would be in violation of the constitutional provision, guaranteeing right of trial by jury. Proceeding as appellant has under the first part of the Act the proceeding amounts to no more than a criminal contempt. The distinction between a criminal and civil contempt is plainly pointed out in **O'Brian v. The People**, 216 Ill. 354, and the court say (p. 368):

"It is again insisted with much earnestness that this proceeding is criminal in its nature, and therefore the defendants below were entitled to be discharged upon their sworn answer, and if their answer was not sufficient they could only be punished after

they had been tried and convicted by jury. Proceedings for contempt of court are of two classes: those which are criminal in their nature and those which are designated as purely civil remedies. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people, as represented by their judicial tribunals. In such cases the application for attachment may be made in the original cause, yet the contempt proceeding will be a distinct case criminal in its nature. Cases of this kind are clearly distinguished from cases where the parties to a civil suit, having the right to demand that the other party do some act for their benefit, obtain an order from a proper court commanding the act to be done, and upon refusal the court, by way of executing its orders, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant and not in the public interest, merely. If imprisonment is ordered, it is not as a punishment, but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interest and rights which he could not otherwise maintain. (**Loven v. People**, 158 Ill. 159; **Crook v. People**, 16 id. 534; **People v. Diedrich**, 141 id. 665; **Lester v. People**, 150 id. 408; **Leopold v. People**, 140 id. 552.)” The same rule has been adhered to in **Hoke v. The People**, 230 Ill. 190; **Rothschild & Co. v. Steger Piano Co.**, 256 id. 200; **The People v. Buconich**, 277 id. 294; **The People v. Elbert**, 287 id. 458, and later cases. In **The People v. Elbert**, *supra*, the court said:

“The distinction between civil and criminal contempts has been frequently made by this court. Prosecutions for criminal contempts are usually those which are instituted for the purpose of punishing a person for misconduct in the presence of the court or with respect to its authority or dignity. When instituted for the purpose of affording relief between private parties the prosecutions are for civil contempts and are sometimes called remedial. (*Hake v. People*, 230 Ill. 174; *O’Brien v. People*, 216 Id. 354.) The dividing line between the acts constituting criminal and those constituting civil contempts becomes indistinct in those cases where the two gradually merge into each other. In those cases contempts have been classified and punished by the courts in some jurisdictions as criminal contempts and in others as civil contempts. Some courts adhere to the rule defining them as civil or criminal contempts, according to the character of the suit in which they occur, designating them as civil contempts if the original suit is a civil suit and as criminal contempts if they arise in an original suit criminal in form. In most cases where they thus rest on the boundary line they are both civil and criminal contempts, and so far as the rights of the contemnors are concerned may be punished as either.”

This proceeding is instituted for the purpose only of punishing a person with respect to the court's authority or dignity, and the charge is a criminal contempt. In a proceeding for criminal contempt, it is sufficient if the answer in the discretion of the court purges the defendant and he is entitled to be discharged. (*People v. Seymour*, 191 Ill. App. 389; affirmed in the same case 272 Ill. 295; *Oster v. The People*, 192 Ill. 473.)

In this case it is not necessary to determine the ownership of the car in question. It is sufficient under the answer of appellee and the pleadings to show that such title was in dispute. In *Custer v. Agnew*, 83 Ill. 194, it was held:

“This is a proceeding under section 23, of chapter 125, Rev. Stat. 1874, page 991, wherein it is provided, that ‘if any sheriff unreasonably neglects to pay any money collected by him on execution, * * * when demanded by the person entitled to receive the same, he may be proceeded against as for a contempt,’ and provides for a forfeiture of five times the amount of lawful interest, etc.

“The proceeding is summary and penal. It is plain it was never designed that, in such proceeding, any debatable fact should be tried in this summary manner upon affidavits. This statute applies only to cases where it is the plain, undisputed duty of the sheriff to pay, and where his failure to pay is wilful.”

An appeal does not lie from a judgment in a criminal contempt proceeding, but a defendant may have a review by a writ of error. (*People v. O'Meara*, 216 Ill. App. 173, and the cases there cited.) In this case it is very doubtful if this court has any jurisdiction or if appellant is entitled to a review. However, no motion has been made to dismiss, and finding no error in the record the judgment of the County Court of Macon County is affirmed.

Judgment affirmed.

A former opinion having been filed and a petition for rehearing presented, the opinion is modified and the petition for rehearing denied.

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General No. 8309

Agenda No. 3

APRIL TERM, A. D. 1929

Ray Bitner, Defendant in Error,

vs.

Gerald Brown, By C. D. Brown, his Next Friend,

Plaintiff in Error.

Error to Circuit Court of Coles County

SHURTLEFF, J.

Defendant in error sued plaintiff in error in the Circuit Court of Coles County to recover damages for injury caused to defendant in error in a collision between the motor cycle of defendant in error, upon which he was riding, and plaintiff in error's automobile, which was standing upon State Highway No. 16, a hard surfaced paved road running from Charleston to Ashmore. The accident occurred at about five-thirty o'clock in the evening of November 22, 1927.

There were three counts in the declaration, the first count charging general negligence in the handling and management of plaintiff in error's machine. The second count charged that the plaintiff in error stopped his automobile on a hard surfaced State road (No. 16) in violation of the statute; and the third count charged that plaintiff in error stopped his automobile on a hard surfaced State road and left it standing thereon without any tail light burning or other warning in violation of the statute, etc., and that it was dark and defendant ran into the same, etc. Each count charges that defendant in error was in the exercise of due care for his own safety and was injured and damaged. There was a trial by jury and a verdict in behalf of defendant in error in the sum of two thousand dollars.

On the trial of the cause plaintiff in error, while represented by counsel, had no guardian *ad litem* appointed by the court or otherwise, although he testified, and his statement was unchallenged, that at the time of the trial he was but nineteen years of age. At the close of plaintiff's case and again at the close of all the evidence plaintiff in error submitted to the court proper motions and instructions that the jury be instructed to find a verdict for the defendant, which were refused. There were general motions for a new trial and in arrest of judgment, which were submitted to the court and each denied and judgment was entered against plaintiff in error.

At the time of the accident plaintiff in error was driving an automobile and had with him his sister, two other girls and a boy named Adams, all of whom, including defendant in error, had been attending the Teachers College at Charleston. The girls had gotten out of plaintiff in error's car before the accident and gone ahead. Defendant in error was riding the motorcycle and following plaintiff in error, who was going east. The evidence shows that the automobile of plaintiff in error had developed engine trouble at the foot of the hill arising from the river. It had been stopped and pushed off the pavement once after reaching the top of the hill while plaintiff in error attempted to adjust it. The trouble was that the gas did not get through the line fast enough. Plaintiff in error would run the car as far as it would go and then wait until enough gas would get through to run it another short distance. About five hundred feet from the top of the hill, on a straight road, the car again stopped. It had been there some two or three minutes, plaintiff in error sitting behind the wheel. Adams had gotten out to wave to defendant in error for the purpose of seeking help. He was about five or six feet from the rear of the car. Defendant in error testified that he had a good light, which would light the road clearly from two to three hundred feet, and that he was looking straight ahead

all the time but did not see the automobile of plaintiff in error in time to prevent running into it. Two automobiles had gone by it shortly before. Defendant in error states that he was running only twenty-five miles an hour. He further states that there was a train on the railroad, the headlight of which dazzled him back at the top of the hill, but he testified that this had little to do with the fact that he did not see the automobile. Defendant in error testified that he look straight ahead all the time but that he neither saw the car nor Adams waving. He further testified that plaintiff in error's car was muddy and had the appearance of the cement paving. There was a sharp conflict as to whether there was a tail light burning at the rear of plaintiff in error's car.

There was no proof offered tending to show that it was one hour after the setting of the sun, and in fact it is suggested on the argument that the almanac shows that on the day in question the sun set at 4:58 o'clock p. m., about thirty minutes before the accident happened. No testimony was presented tending to show that plaintiff in error voluntarily stopped his car upon the pavement, or that its **stopping** in any manner was due to the negligence of plaintiff in error. On the other hand, plaintiff in error argues strenuously on the proof presented that defendant in error was guilty of contributory negligence. The record is brought to this court by writ of error for review.

From our examination of the record we conclude that if the accident happened within one hour after sun set, and plaintiff in error did not voluntarily stop the car on the pavement and was guilty of no negligence in that regard, defendant in error will be compelled to recover, if he recover at all, under the first count in the declaration charging general negligence in the operation and management of the car. We do not go further into the merits of the case inasmuch as the proofs will have to be presented to another jury.

The uncontradicted evidence in the record is, that plaintiff

in error at the time of the trial was a minor and only nineteen years of age and that no guardian **ad litem** was appointed by the court to protect his interests. It was held in **Thurston v. Tubbs**, 250 Ill. 542:

“Since the failure of the court to appoint a guardian **ad litem** for plaintiff in error to represent him and protect his rights in the premises requires a reversal of the decree, we do not deem it proper to express any opinion upon any question relating to the merits of this case until plaintiff in error has had an opportunity to be heard by a guardian **ad litem** appointed by the court to properly protect his interests. The record should affirmatively show that a guardian **ad litem** was appointed to appear and answer for infant parties, otherwise the judgment or decree will be reversed on error or appeal. 22 Cyc. 636; **Essington v. Neill**, 21 Ill. 139; **Rhoads v. Rhoads**, 43 id. 239; **Hall v. Davis**, 44 id. 494; **Roodhouse v. Roodhouse**, 132 id. 360; **Ames v. Ames**, 151 id. 280; **Phillips v. Phillips**, 185 id. 629; **Binns v. LaForge**, 191 id. 598; **White v. Kilmartin**, 205 id. 525.”

This seems to be the last holding of the Supreme Court upon this question.

Counsel for defendant in error seriously contend that this question cannot be first raised in this court; that if it is an error it is an error of fact which must be corrected in the lower court and cannot constitute error upon review, citing: **French v. Creath**, 1 Ill. (Breese) 12; **Beaubien v. Hamilton**, 3 Scam. 213; **Mains v. Cosner**, 62 Ill. 465.

In **French v. Creath**, *supra*, a defendant upon review sought to reverse a judgment against him obtained by a minor in a case where a minor appeared as plaintiff without a “next friend,” and the court refused to hold it was error. The interests of the minor had been in no way injured and the defendant was not harmed.

In *Beaubien v. Hamilton*, *supra*, plaintiff in error, a minor, suffered a default judgment to be taken against him in the lower court and sought a review in the Supreme Court, urging as an assignment of error his infancy which asked the Supreme Court to establish, it no wise appearing in the record in the court below. This constituted an error in fact which only the lower court could correct.

In *Mains v. Cosner*, *supra*, substantially the same state of facts existed, though the opinion in the case states: "The fact of infancy, if it was a fact appeared only incidentally on the examination of one of the witnesses." It does not appear that defendant made any motion either for a new trial or in arrest of judgment, and the court properly held that the error was an error of fact and that defendant should have made a motion in the court below to set aside the verdict and judgment. Defendant in error in this case insists that the question was not raised in the court below. With this contention we can not agree. Plaintiff in error made a general motion for a new trial and upon the overruling of that motion a motion in arrest of judgment, which was also overruled; both of which motions and the rulings thereon were incorporated in the bill of exceptions. These motions stated no grounds upon which the motions were based and the provisions of the statute were, therefore, waived. (Sec. 77, Chap. 110 Revised Statutes (Cahill's); *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 109; *Met. West Side El. R. R. Co. v. White*, 166 id. 378; *Chicago Union Traction Co. v. City of Chicago*, 209 id. 445.) Plaintiff in error, therefore, has preserved by exception every error in the rulings of the court in passing upon those motions that presents any existing cause for a new trial or an arrest of judgment. It is presumed that all such matters were presented to the court below. The testimony of plaintiff in error was presented and was uncontradicted that he was a minor of tender years. It is in the

record. Plaintiff in error can not be charged with the superior wisdom that he should have presented the subject in some other legal form. He is not even deemed of sufficient discretion if he is a minor to employ counsel in his behalf. This court is compelled to take the record as establishing the infancy of plaintiff in error, and from the record we presume it was called to the attention of the court. The question is, how does it affect the merits of the judgment entered? It is true that the rule laid down in *Thurston v. Tubbs*, *supra*, refers to a long line of chancery cases, but the rule is the same in equity and at law. The subject was discussed in *Peak v. Shasted*, 21 Ill. 137, and the court say that such a judgment is voidable and not void, and held: "At the November term following, Peak, after having given a notice, entered a motion to set aside the judgment, upon the grounds that he was, at the time the writ issued and the judgment was rendered, a minor under twenty-one years of age, and because no guardian appeared or was appointed to defend the action. In support of the motion, he filed an affidavit of his father, from which it appears the defendant was a minor when the judgment was rendered, and for some months afterwards, but the court on the hearing overruled the motion. From this decision he appeals to this court.

"The doctrine is familiar that a minor can only appear to defend by a guardian, and not in person or by attorney. And in case the minor fails to appear, to have a guardian appointed, it is the duty of the court, on application by plaintiff, to appoint a guardian, which, to be regular, must be done before plea. 2 McPherson on Infants, 359. And if an infant appear in person or by attorney, it is error in fact, and may be assigned in the court in which the judgment was rendered. 4 B. and Ad. 90; *Meredith v. Sanders*, 2 Bibb, 101. And a judgment or decree rendered without any guardian, or an appearance by attorney, is not void, but merely voidable on error brought. *Porter v. Robinson*, 3 A. K. Marsh. 253.

And if an infant appear in person or by attorney, it is error in fact, and may be assigned in the court in which the judgment was rendered. 4 B. and Ad. 90; **Meredith v. Sanders**, 2 Bibb, 101. And a judgment or decree rendered without any guardian, or an appearance by attorney, is not void, but merely voidable on error brought. **Porter v. Robinson**, 3 A. K. Marsh. 253. It would then follow, that if the appellant was at the time of the rendition of this judgment, a minor, there was error in fact in its rendition, for the want of appearance by a guardian. The plaintiff should have applied to the court, if the defendant was a minor, and had a guardian *ad litem* appointed, and having failed to do so, he cannot object if the judgment is set aside, on its appearing that the defendant was a minor.

“But it is urged that the only mode by which a judgment can be reversed for error in fact, is by writ of error *coram vobis*. That it may be done by this writ is true, but this court has repeatedly held that it may likewise be done by motion. **Sloo v. The State Bank**, 1 Scam. R. 428; **Beaubien v. Hamilton**, 3 Scam. R. 213. By the former practice in England, it could alone be done by this writ sued out of the court in which the supposed error existed; and this writ is still in use in some of the States of the Union, while in many of them it has gone into disuse, and has been superseded by motion to amend. **Pickett v. Signwood**, 7 Pct. R. 148.

“The objection that it is an error in fact, and should be tried by a jury, is we think without force. If the fact is disputed, the court can hear and dispose of the motion, and there are grounds for doing so, set aside the judgment, and let the defendant in to plead, and then the fact would be tried by a jury. When the court sets aside the judgment and the party files his pleas, the plaintiff may reply any matter in avoidance of the plea that he might have done, had the plea been filed on the return of the process.”

In **Hall v. Davis**, 44 Ill. 498, the court held:

“It was also held, that, if a minor defendant should appear in person, or by attorney, it would be error in fact, which may be assigned in the court rendering the judgment. Also, that a judgment or decree against a minor without a guardian, may be set aside, on motion, in the court rendering it, and let such defendant in to plead. In that case, the application was made to the court on motion, and we said that such practice was regular. In this case, it appears by the petition, that no appearance was entered by Mary J. Davis, either in person, by guardian, attorney or otherwise, nor does any such appearance appear from the record in the cause. It appears from the petition, verified by the oath of the petitioner, that she was a minor when all of these proceedings were had, and that her rights were not protected in the decree of the court. This, then brings this case within Peak’s case. The courts below should have allowed the petition, and let Mary J. Hall in to defend the suit, and, on a final hearing, have rendered such a decree as should be required by the case made by the parties.

“So far as relates to the application of Mrs. Hall, it however, depends upon other principles. She was then of age, under no disability, and was free to defend her application and to assert her rights. She was not a party to the suit, and we know of no rule of practice which would authorize the court to set aside the decree on her motion.”

In **Millard v. Marmon**, 116 Ill. 653, the court held:

“In **Peak v. Shasted**, 21 Ill. 137, (a case where a judgment was rendered against a minor in an action at law,) it was held that a minor could only appear and defend by a guardian, and if the minor failed to appear and have a guardian appointed, it was the duty of the court to appoint one to defend the action. The court also held that a judgment rendered against a minor without the appointment of a guardian, was not void, but merely voidable. In **Kesler v. Penninger**, 59 Ill. 134, the rule announced in the case last cited was approved, and it was held to be error to proceed to a trial

without the appointment of a guardian. Here, the judgment having been rendered against a minor without the appointment of a guardian to defend the action, may be regarded as erroneous or voidable, but we are aware of no well considered case which holds that such a judgment, when called in question collaterally, as here, is void. As said before, the justice had jurisdiction of the subject matter and of the person, and although the judgment was erroneous or voidable, it can not, under any well settled rule of law, be held to be void in a collateral proceeding.”

In all these cases it is held that such a judgment is erroneous and voidable and that error can be assigned on the ruling of the trial court thereon. It would serve no useful purpose, as contended by defendant in error, that the defendant, claiming to be a minor, must stand by and await the entry of a judgment against him and then file his motion in the nature of a motion **coram nobis** to correct an error of fact in the record. It was the duty of the plaintiff in the case, as soon as that question appeared in the record, to cause the question to be determined in some proper form, and if it was determined that plaintiff was a minor a guardian **ad litem** should have been appointed and plaintiff in error should have been compelled to again plead. This was not done and plaintiff in error can take advantage of the error in this court and as the record now stands the motion in arrest of judgment should have been granted and plaintiff in error should have been granted a new trial.

For the errors appearing in the record, the judgment of the Circuit Court of Coles County is reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

Reversed and remanded.

16a
254 I.A. 626³
General No. 8312

Agenda No. 5

APRIL TERM, A. D. 1929

Nellie Barr Flickner, Appellee,

vs.

Hanna Barr, et al., Appellant.

Appeal from the Edgar County Circuit Court.

SHURTLEFF, J.

On the 16th of July, 1928, Nettie Barr Flickner filed her bill in the Circuit Court of Edgar County, Illinois, together with an order in vacation of Honorable George W. Bristow, one of the judges of said court, directing the clerk to issue a writ of injunction as prayed therein. The bill alleged that one William A. Barr departed this life on or about the 18th day of July, 1925, leaving a last will and testament, and leaving the appellant, Hanna Barr, him surviving. The bill alleged that in his lifetime the said William A. Barr was seized of a fee simple title to an undivided one-third of certain lands described in the bill and consisting of about two hundred thirty-nine acres.

The bill further alleged that after the death of William A. Barr, appellant, Hanna Barr filed with the Recorder of Deeds of Edgar County a deed, which purported to convey from William A. Barr to her the said undivided one-third of the said lands, and the same appeared on its face to have been executed on December 22, 1923; said deed being filed for record September 9, 1925, after the death of the said William A. Barr.

The bill further alleged that the appellant, Hanna Barr, who was made defendant in the bill of complaint, claimed that William A. Barr in his lifetime executed a last will and testament in and

by which the said decedent devised the same real estate as described in the purported deed to her.

The bill further alleged that the said Hanna Barr, if in fact there ever was a deed made, kept the same concealed and kept concealed all information regarding the same and its execution, and did not have the same recorded until after the death of William A. Barr.

The bill further alleged that at the time of the execution of said purported deed, said William A. Barr was wholly incompetent mentally and physically to sign his name or to execute, acknowledge or deliver any deed or transact any business whatever; that the said Hanna Barr secured the execution of the deed through fraud and circumvention and undue influence and without any consideration whatever; and if it was executed at all, could not have been other than a gift by William A. Barr, the decedent, to his wife Hanna Barr, and was made for the purpose of defrauding the creditors of the said William A. Barr and those who had dealt and who must therefore deal with him, and particularly to defraud complainant of her just claim against the said William A. Barr and his estate as set forth in the bill.

The bill further alleges that after the death of William A. Barr, his widow, the said Hanna Barr, upon a petition filed by her, was appointed the executrix of the said will and of the estate of William A. Barr, qualified as such and has been from that time down to the present acting as such executrix .

It is further alleged in the bill that on January 3, 1928, Hanna Barr filed her complaint for partition of the lands, alleging that by virtue of the deed she was the owner of an undivided one-third interest; and that at the February term of the Circuit Court of Edgar County a decree of partition was rendered and commissioners appointed, who reported that said lands were not susceptible to division and partition, and the lands were ordered

sold by the Master in Chancery of Edgar County for \$10,277, and that said moneys were paid to the Master in Chancery and are now held by him for distribution among the parties in interest, subject to the order and decree of the Edgar County Circuit Court; that by the terms of said order of distribution there was due said Hanna Barr the sum of \$3,158.99 out of the proceeds of the sale of said lands, to which moneys said Hanna Barr claims title by virtue of the alleged deed.

The bill further alleges that the appellee on April 26, 1926, filed her claim in the County Court of Edgar County against the estate of William A. Barr for four thousand dollars, and that afterwards on July 6, 1928, and after the filing of the bill for partition and the rendition of the decree therein, said claim was allowed after a hearing on the same in said County Court; and that it was ordered by said Court that said claim be paid the appellee out of the proceeds of the estate of William A. Barr.

The bill further alleges that by virtue of the fraud and circumspection and undue influence of Hanna Barr over said decedent, the said William A. Barr executed said purported deed at a time when he was of unsound mind and was physically wholly incapable of writing his name or mentally comprehending or understanding the act in which he was engaged or any business whatever; and that the said Hanna Barr attempts to hold the moneys as against **bona fide** creditors and particularly appellee's claim as a **bona fide** creditor of said estate, and to defraud her out of the payment thereof.

The bill further alleges that the Circuit Court of Edgar County would be in session July 16, 1928, and that Fred Rhoads, Master in Chancery, who held the money ready for distribution, was about to pay the said sum of \$3,158.99 to the said Hanna Barr unless restrained from so doing, and that the appellee would lose her claim.

The bill alleges that the said decedent, William A. Barr, had no other property or estate other than the one-third interest in the land conveyed, and that the said Hanna Barr, his widow, had no property other than the interest so conveyed in said lands.

The bill prays that upon a hearing the Master in Chancery be ordered by the court to pay the amount in his hands to the appellee or to the said Hanna Barr as executrix so that it can be applied on the debts of the estate, and that the said Master be enjoined from paying said money to the said Hanna Barr, and that the said Hanna Barr be restrained from selling, assigning or in any manner disposing of her claim for the purpose of hindering and delaying the appellee in the collection of her said claim; and that the appellee have such other and further relief in the premises as equity may require and to the court should seem meet.

To this bill of complaint the defendant, Hanna Barr, filed her answer. The defendant, Fred Rhoads, did not answer the bill.

The answer of the defendant, Hanna Barr, after saving and reserving to herself all insufficiencies of the bill, admitted in said answer that William A. Barr was seized of the lands described in the bill; that after his death she caused to be filed in the office of the Recorder of Deeds of Edgar County the deed described in the bill; and admitted that there was a last will and testament, but denied that said will was operative upon the said described real estate for the reason that the decedent had conveyed the lands mentioned in the will prior to his death and prior to the admitting of the will to probate. The defendant Hanna Barr in her answer denied that she concealed said deed and all information regarding the same as charged in the bill; denied that at the time the deed was executed William A. Barr was not of sound mind and memory and physically able to sign his name and transact business; denied that said deed was secured by

fraud and circumvention, and denied it was a gift either wholly or in part without the receipt of anything in value; but the answer does not allege, nor set out what consideration was given for the deed, if any. The answer denies that said deed was made for the purpose of defrauding creditors or defrauding the appellee of her just claims, but does not set out any property owned by the estate. The answer denies that the appellee then or at any time had a just and valid claim against the said William A. Barr or against his estate for four thousand dollars or any other amount. The defendant in her answer asserts the fact to be that at the time said deed was executed and delivered to the defendant, the appellee was not a creditor of said William A. Barr. The defendant admits that after the death of William A. Barr she petitioned the County Court for letters testamentary upon his estate and was appointed executrix of the last will and testament of William A. Barr; that she qualified and has been acting as such executrix.

The defendant admits that after the death of William A. Barr she filed a bill for partition, as alleged in the bill of complaint, and states the fact to be that among other persons made parties defendant to said bill was Nettie Barr Flickner, the appellee; that she was served with summons and defaulted; that after the decree of partition was entered she appeared and had a decree entered modifying the decree of partition in certain respects, but denies that said decree was in any manner changed or modified as to the undivided one-third interest in said real estate conveyed by said purported deed; and that thereafter there was a sale by the Master in Chancery. The answer sets out that Nettie Barr Flickner purchased the land sold, accepted the title and executed a mortgage covering the said real estate after the Master in Chancery had delivered to her a deed for the same; that said deed and the mortgage so executed and delivered was recorded in the office of the Recorder of Deeds of Edgar County, Illinois, and that by virtue of the purchase of said real estate

appellee is estopped from maintaining her bill of complaint. The defendant admits that appellee filed her claim in the County Court against the estate of William A. Barr; admits that the same was allowed in the sum of four thousand dollars, but charges that the allowance of said claim was the result of misconduct on the part of one James K. Lauher, attorney for the executrix, in that the said James K. Lauher did not comply with the request of the defendant as executrix to be present at the time such claim came up for hearing; but does not set forth any facts which show any diligence on the part of the executrix herself or wherein the said attorney was negligent.

The answer further denies that William A. Barr executed the deed or the will by virtue of any fraud, circumvention or undue influence exercised by the defendant over him; and further denies that the said William A. Barr was of unsound mind or memory or physically incapable of signing his name at the time said instruments were executed; and further denies that said deed and will and the conveyance by virtue thereof, was a gift; and further denies that the defendant attempts to hold the same by virtue of any fraudulent transaction.

The defendant further denies that said William A. Barr's estate amounts to nothing, but does not set forth of what the estate consists or what property belongs to the estate out of which any claims may be satisfied or paid.

The defendant denies that the court has jurisdiction over the subject matter contained in the bill, and denies that there is any equity set forth in the bill.

After the filing of the answer on October 8, 1928, on to to-wit, November 20, 1928, the defendant filed her motion to dissolve the temporary injunction on the following grounds: that there is no equity on the face of the bill and that the material allegations of the bill are denied by the defendant's answer.

Upon hearing the court overruled the motion to dissolve the temporary injunction.

The foregoing is substantially a statement of the facts set out in the pleadings and the action taken by the court. Appellant has appealed from this interlocutory order. The answer filed by appellant was not sworn to.

It is contended that the allegations of fraud are vague and general and insufficient to support an injunction. The bill proceeds upon the theory that William A. Barr in his lifetime conveyed the lands in question to his wife, Hanna Barr, for no consideration, and that Barr, having no other property of any kind, made this conveyance for the purpose of defrauding his creditors and that he was indebted to appellee. It is further charged that at the time of the execution of the purported deed Barr was wholly incompetent mentally and physically to sign his name or to execute, acknowledge or deliver any deed or transact any business whatever, and that the deed was concealed and not placed of record until after Barr's death. We can not hold that these allegations are vague or general. It is contended by appellant, no replication having been filed, that this is a hearing on bill and answer, and that the allegations in the answer are to be taken as true, yet no notice was given complainant of answer filed, under section 28 of chapter 22 of the Revised Statutes, and the cause was never set down for hearing upon bill and answer in the Circuit Court as required by the chancery practice. The answer not being sworn to this motion to dissolve the injunction for want of equity appearing upon the face of the bill does not involve the merits of the cause, must be treated as a demurrer to the bill, and for the purposes of the motion in this cause admits the truth of all the allegations in the bill. (**Bill Board Publishing Co. v. McCarahan**, 151 Ill.

App. 227; **Smith v. Kochersperger**, 173 id. 201; **Marks v. Chicago Yacht Club**, 121 id. 308, affirmed 219 Ill. 417.)

Appellant further contends, appellee having been a party to the partition proceeding, that the decree in that cause is *res adjudicata* and that appellee cannot attack the right and title of appellant to the lands in question or the proceeds thereof in this collateral proceedings, citing **Chapman v. Chapman**, 256 Ill. 593. But in a substantially similar case, **Deke v. Huenkemeier**, 289 Ill. 154, the court held: "The former decree is conclusive only as to facts directly and distinctly put in issue and the finding of which is necessary to uphold the decree. In ascertaining whether a particular matter has become *res judicata* the reasoning of the court is less regarded than the judgment or decree itself and the premises which it necessarily affirms. (1 Freeman on Judgments, secs. 258, 259.) Under no circumstances will a judgment or decree take effect upon rights not then existing. (1 Freeman on Judgments, sec. 329; 15 R. C. L. 977-982; **Kenealy v. Glos**, 241 Ill. 15.) The former decree is no bar to appellant's right of recovery of her award, if such right she has."

Appellee had no standing in a court of equity to enforce her claim until she had exhibited it and procured its allowance in the Probate court. **Winslow v. Leland et al**, 128 Ill. 339. In this case the court holds:

"Not only is it true that when a debtor dies, the law gives new legal remedies against his representatives, but the rule is imperative that, to entitle a creditor to share in the distribution of his estate, those remedies must be pursued. A creditor of a deceased person must exhibit and prove his claim in the county court before he can be entitled to payment. **Reitzell v. Miller**, 25 Ill. 67. And in this respect, judgment creditors, except so far as their judgments are liens on real estate, and simple contract

creditors, stand upon the same footing. **Paschall v. Hailman**, 4 Gilm. 285; **Turney v. Gates**, 12 Ill. 141; **Clingman v. Hopkie**, 78 id. 152. It is difficult then to see how the mere fact that a creditor has exhausted his legal remedies against his debtor while living, can furnish a sufficient ground for proceeding by creditor's bill to reach personal estate while the administration is in progress, especially where no fraud is charged against the intestate, and the only scope of the bill is, to seek a remedy against the fraud or failure of duty of the administrator himself, and to reach property which the administrator is entitled to but which he has failed to get into his possession."

Appellee is not attacking the decree in partition collaterally or otherwise, but as a creditor is seeking to subject to the payment of the decedent's debts the proceeds of lands and premises that are by law subject to the payment of said debts.

In the opinion of this court the Circuit Court of Edgar County did not abuse its discretion in refusing to dissolve the temporary injunction. It follows that the decree of the Circuit Court of Edgar County is affirmed.

Decreed affirmed.

70
254 I.A. 626⁴ a
General No. 8319

Agenda No. 8

APRIL TERM, A, D, 1929

Catherine Knox, Executrix of the Last Will and Testament of Isabelle Cooney, deceased, Appellant,

vs.

William Maher and Pleasant Plains State Bank,
Appellees.

Appeal from the Circuit Court of Sangamon County.

SHURTLEFF, J.

This is an appeal by Catherine Knox, executrix of the estate of Isabelle Cooney, deceased, from the judgment of the Circuit Court of Sangamon County, directing the Pleasant Plains State Bank to deliver to Appellee William Maher a certain promissory note held by said bank, but claimed by said executrix as assets of the estate of said deceased. The case was in the Circuit Court upon appeal from the Probate Court and by stipulation of the parties the cause was heard in the Circuit Court upon a transcript of evidence and proceedings had in the Probate Court. The leading and undisputed facts are substantially as follows:

Isabelle Cooney in her lifetime lived near the village of Pleasant Plains in Sangamon County, and William Maher, a much younger person, practically grew up in her home; in fact, he was commonly known in the neighborhood as "Billy Cooney." Some years before her death Mrs. Cooney loaned forty-three hundred dollars to a neighboring farmer, Frank Hergenrother. Upon a renewal of the note and desiring, as it is admitted, to make a gift to William Maher, Mrs. Cooney, together with said Frank Hergenrother, went to the Pleasant Plains State Bank and by their direction a promissory note was prepared by George Purvines, the cashier of said bank, in words and figures as follows:

“\$4300.00

Nov. 25th, 1922.

Pleasant Plains, Ill.

“Five years after date I promise to pay to the order of . . . Mrs. L. C. Cooney or Wm. Maher, in event of the death of Mrs. L. C. Cooney.

Forty-three Hundredno Dollars

THE PLEASANT PLAINS STATE BANK

Pleasant Plains, Illinois.

“Value received with interest at the rate of 3 per cent from date until paid.

Frank Hergenrother.’

The note after being executed, was left by direction of Mrs. Cooney with the bank for safe keeping, but without any specific order as to the delivery thereof. Mr. Purvines put the note in an envelope, containing no other papers, and placed the same in a cabinet in said bank consisting of open boxes, lettered from A to Z, and in the particular box marked “C.” Mrs. Cooney had other papers in the bank, but the same were in no manner attached to said envelope. Purvines stated that he considered that the bank was holding the note for all the parties thereto as their interests might appear, which the court held, however, was incompetent.

Mrs. Cooney died testate on or about December 20, 1923, and her will was duly probated in the Probate Court of said Sangamon County. At various times after the making of said note she expressed her wish that the amount thereof should be paid to William Maher, of whom apparently she was always very fond.

On January 16, 1928, the executrix filed a petition in the probate court under section 81 of the Administration Act for a citation against said Pleasant Plains State Bank to show cause why said note should not be delivered up to said executrix as assets of said estate, and also prayed therein that said Frank Hergenrother and William Maher be notified, and such citation

was duly issued and the parties thereto served. In the petition it was expressly stated that said promissory note was intended as "an expression of a desire to make a gift to said William Maher," but it was alleged that "said gift was never effected by the delivery of the possession of said note to said William Maher."

The bank answered said petition, admitted that it held the note and asked the direction of the court relative thereto. Frank Hergenrother did not answer. William Maher filed an intervening petition and answer setting up that both as a gift to him from Mrs. Cooney, and also by virtue of the contract between her and Frank Hergenrother, said note and the right to collect the same became his own exclusive property.

Upon the hearing in the probate court there was no dispute as to the facts which were as above set forth, and which were testified to by said George Purvines and Frank Hergenrother. There, as here, the sole question was as to the legal right under the facts which were undisputed.

The probate court on March 26, 1928, the March term, 1928, thereof, entered an order denying the petition of said executrix, finding that the note in question was the property of William Maher and ordering said bank to deliver said note to said William Maher. Neither at the time of entering said judgment nor at any time thereafter did the petitioner pray any appeal in the probate court to the circuit court. But on April 12, 1928, that is to say at a subsequent term of said probate court, and without any previous order therefor, the appellant herein presented to the judge of the probate court an appeal bond in the sum of two hundred dollars for an appeal to the circuit court, which bond was thereupon approved by the probate court and a transcript of record ordered.

Pursuant to that order the transcript of proceedings in said

probate court was prepared and certified to the circuit court. And thereupon the said Appellee William Maher, limiting his appearance to the special purpose involved, entered his motion in the circuit court to dismiss said attempted appeal from the probate court for the reasons: (a) that no motion or order for such appeal was ever made or entered at the term of said probate court wherein the judgment attempted to be appealed from was rendered; and, (b) that after the term at which said judgment was entered, and without an order entered during said judgment term, the probate court had no further jurisdiction to allow said appeal. Upon an entering of said motion to dismiss the appeal the circuit court denied the same, to which order the said Appellee William Maher duly excepted and at the same term a bill of exceptions was duly allowed showing the action on said motion to dismiss.

Thereafter in the circuit court, as already indicated, it was stipulated that the cause might be heard upon the transcript of proceedings and evidence heard in the probate court, and such hearing was accordingly held. The circuit court entered a judgment substantially as was entered by the probate court, finding that said William Maher was the owner of and entitled to possession of the said note and ordering and directing that the Pleasant Plains State Bank deliver the same to said William Maher, and directing the dismissal of said petition. From that judgment the appellant prosecutes this appeal.

It is first contended by appellee upon cross error filed that the Circuit court of Sangamon county erred in not dismissing appellant's appeal to that court for the reason that no appeal was taken by appellant from the probate court within the term at which the judgment was rendered. Appellant attempted an appeal in the manner provided for taking appeals from justices of the peace. It is contended that it did not effect an appeal. No

order was entered allowing an appeal, fixing the amount of the bond or taking an appeal during the term at which the final order was entered. Appellant contends that the appeal was taken under section 124 of the Administration Act and should be perfected in the same manner as appeals are perfected from a judgment of a justice of the peace, citing: **Mundy v. Mundy**, 230 Ill. App. 269.

There have been various interpretations of the statutes upon this subject by the different appellate courts, but no late case of the Supreme Court specifically discussing this question except *Hall v. First National Bank*, 330 Ill. 234. Appellee contends and presents that under the Constitution of 1818, provision was made for the selection of justices of the peace to exercise such jurisdiction as the General Assembly might provide (secs. 1 and 8, article IV, Constitution 1818), and that pursuant thereto justices of the peace were provided for by a statute enacted in 1845 (Chap. 59, stat. 1845), and by another statute enacted in the same year provision was made for a court of probate in each county to be presided over by a justice of the peace. That statute provided that appeals might be taken from the court of such probate justice in the same manner and with like effect as appeals from the judgments and decisions of other justices of the peace (stat. of 1845, p. 426-429.)

The Constitution of 1848 provided for the creation of the county court with jurisdiction in probate matters and to be presided over by a county judge (secs. 16 and 17, article V, Con. 1848)¹. Under that constitution and by an act passed in 1849 (Laws 1849, p. 62-67) county courts were established. By that act it was provided that the jurisdiction of the probate courts theretofore existing should be transferred to the county courts and that appeals from the judgments of such courts might be taken "in the manner prescribed by law," and section 13 of that act provided that such appeals might be taken as in case of similar

judgments rendered by the probate court. It is contended that by statute the appellate procedure of the newly created county courts in probate matters was expressly made to conform to the practice theretofore prevailing and existing in the probate courts, and such probate courts were essentially justice of the peace courts; they were not courts of record.

The Constitution of 1870 continued the county courts (sec. 1, article VI,) vested them with probate jurisdiction (sec. 18, article VI) and provided that appeals might be allowed from their judgments, "as may be provided by law" (sec. 19, article VI), and also authorized the General Assembly to provide for the establishment of probate courts (sec. 20, article VI). Section 29 of article VI further provided:

"All laws relating to courts shall be general and of uniform operation and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." This provision of the Constitution and its relation to courts has been considered and applied in **Kingsbury v. Sperry et al**, 119 Ill. 286; **Dawson v. Eustice**, 148 id. 346; **People v. Hibernian Bank Ass'n**, 245 id. 524; **Pence v. Pettett**, 211 Ill. App. 588.

It was held in **Dawson v. Eustice**, *supra*, and **Kingsbury v. Sperry et al**, *supra*, that the probate court, when established, and the county courts in other counties, as respects all matters of probate and the application of guardians to sell or mortgage lands of minors, are of the same class or grade.

Under the Constitution of 1870 the Administration Act was passed in the year 1872, the provisions whereof throughout assume that the same would be executed by the county courts. That act contained two sections with regard to appeals. The first of said sections,

being sections 68 (Par. 69, Chap. 3, Cahill), provided that:

“In all cases of the allowance or rejection of claims by the county court, as provided in this Act, either party may take an appeal from the decision rendered to the circuit court of the same county, in the same time and manner appeals are now taken from justices of the peace to the circuit courts, by appellant giving good and sufficient bond, with security, to be approved by the county judge; and such appeals shall be tried *de novo* in the circuit court.”

And section 124 of said Act, which is also a copy of section 138 of the Wills Act of 1845, provides as follows (Par. 126, Chap. 3, Cahill):

“Appeals shall be allowed from all judgments, orders or decrees of the county court, in all matters arising under this Act to the circuit court, in favor of any person who may consider himself aggrieved by any judgment, order or decree of such court, and from the circuit court to the supreme court, as in other cases, and bonds with security to be fixed by the county or circuit court, as the case may be.”

From the above it thus appears that up to the time of the adoption of the Administration Act in 1872 the appellate practice in probate matters was essentially the same as that prevailing in the courts of justices of the peace.

In the year 1874, however, our present county courts were reorganized by an Act approved March 26th of that year and entitled, “An Act to extend the jurisdiction of County Courts and to provide for the practice thereof, to fix the time for holding the same, and to repeal an Act therein named.” By that statute the county courts as now existing were completely reorganized. After providing for the establishment and jurisdiction of said courts, including all matters of probate, section 122 of said Act contains the following with respect to appeals. (Par. 321, Chap. 37, Cahill):

“Appeals may be taken from the final orders, judgments and decrees of the county courts to the circuit courts of their respective counties in all matters, except as provided in the following section, upon the appellant giving bond and security in such amount and upon such conditions as the court shall approve, except as otherwise provided by law. Upon such appeal the case shall be tried *de novo*.”

The probate courts were created by an act approved April 27, 1877, entitled “An Act to Establish Probate Courts in all counties having a population of 70,000 or more, to define the jurisdiction thereof, and to regulate the practice therein, and to fix the time for holding the same.” (Pars. 331-354, chap. 37, Cahill.)

After providing for the establishment of such courts, and fixing the jurisdiction thereof to include all probate matters concurrently with the county courts, said Act contains the following provisions in section 11 thereof with respect to appeals to the circuit court (Par. 341, Chap. 37, Cahill:)

“Appeals may be taken from the final orders, judgments and decrees of the probate courts to the circuit courts of their respective counties in all matters except in proceedings on the application of executors, administrators, guardians and conservators for the sale of real estate, upon the appellant giving bond and security in such amount and upon such appeal the case shall be tried *de novo*.”

Under the reorganization of the county court in 1874 and the establishment of the probate court in 1877, each was made for the first time a court of record.

In *Mundy v. Mundy*, 230 Ill. App. 269, cited by appellant, the court holds:

“In a case of this kind the right to appeal is governed

by section 124 of the Administration Act (Cahill's Ill. St. ch. 3, par. 126.) Any person who may feel himself aggrieved by the judgment of the county court may appeal whether he is a party to the record or not. **Collins v. Kinnare**, 89 Ill. App. 236; **Weer v. Gand**, 88 Ill. 490. The appeal may be perfected in the same manner as appeals from justices of the peace. **Beardsley v. Hill**, 61 Ill. 354. It is not necessary that an appeal should be prayed in the county court or that the court should enter an order allowing the appeal. **Fix v. Quinn**, 75 Ill. 232; **Haaren v. Miller**, 139 Ill. App. 405. It necessarily follows that appellant had a right to appeal without the other respondents signing the appeal bond."

Mr. Justice Dibell, in the case of **Pence v. Pettett**, 211 Ill. App. 588, gave a great deal of consideration to the construction of these various statutes for appeal, and on page 592 held: "If section 68 of the Administration Act (J. & A. Par. 117) applies to appeals from the allowance or rejection of claims by the Probate Court, then the bond given in this case was insufficient because not double the amount of the judgment and costs. We see no escape from the conclusion that by section 8 of the Probate Court Act (J. & A. Par. 3266) the Administration Act is embodied therein. If so, there is one general provision for appeals under section 11 of the Probate Court Act. (J. & A. par. 3269), and a special and different provision for appeals from the allowance or rejection of claims under section 68 of the Administration Act (J. & A. par. 117). This does not create any new or unusual condition, for section 124 of the Administration Act (J. & A. par. 173) contains a general provision for appeals differing from that of section 68 in regard to appeals from the allowance or rejection of claims. Until the Probate Court Act was passed, the administration of the estates of deceased persons had been for many years conducted in the County

Courts and is yet so conducted in most of the counties of the State; yet the County Court Act in section 122 J. & A. par. 3248) has a general provision for appeals upon appellant giving bond and security in such amount and upon such conditions as the court shall approve. It therefore appears that before the Probate Court Act was adopted there were two general provisions for appeals, one in the County Court Act and one in the Administration Act, and also a different provision specially limited to the allowance or rejection of claims."

This gives an entirely different construction to section 124 of the Administration Act than is presented in *Mundy v. Mundy*, *supra*. We are not concerned with Mr. Justice Dibell's holding that section 68 of the Administration Act is still in force, applying to a separate and special class of cases, as that question does not arise in this case. Neither are we concerned whether section eight of the Probate Court Act has effected an "embodiment" of the Administration Act. That section reads:

"The process, practice and pleadings in said court (probate court) shall be the same as those now provided or which may hereafter be provided for the probate practice in the county courts of the State, and all laws now in force or which may hereafter be enacted concerning wills or the administration of estates, shall govern and be applicable to the practice in the probate courts of the State." The County Court Act contained a section somewhat similar. If section 124 of the Administration Act is to be construed as providing for appeals in manner as taken before justices of the peace, how can it be said that the Probate Act and the County Court Act took over that section with its construction, when, in each of the new acts the General Assembly provided for appeals to be taken in an entirely different manner? If appellant's construction of section 124 of the

Administration Act is correct, then we are in the anomalous position in probate matters of having one method of appeal provided for in the Administration Act and an entirely different method of appeal provided in both the County Court Act and the Probate Act. If this is the situation, then one of two results must follow: either the provisions of the Constitution have been violated and the practice is not uniform, or the sections providing for appeal in the County Court Act and Probate Court Act have never been adopted and are void. The latter result can not follow for the reason that the court held in **Hall v. First National Bank**, *supra*, that the appeal was properly taken under section 122 of the County Court Act.

In **Hall v. First National Bank**, *supra*, (330 Ill. 235) one W. C. Hall filed his petition to set aside the will of Thomas N. Hall, deceased. The County Court denied the petition and petitioner prayed and was allowed an appeal and the court fixed the amount of the bond, but no time was fixed within which the bond should be presented and filed. The bond was not presented and filed during the term. It was held that the appeal should be dismissed. In **Pence v. Pettett**, *supra*, the court held that the provisions of section 124 of the Administration Act and the provisions for appeal in the County Court Act and the Probate Act all provided for the appeal to be taken in substantially the same manner. Under section 124 of the Administration Act the appeal is "to be allowed * * in all matters arising under this Act * * as in other cases, and bonds with security to be fixed by the county or circuit court, as the case may be." "The appeal is to be allowed." This presumes an order of court. Under section 16 of the Wills Act it is provided that "appeals may be taken," etc., and under section 68 of the Administration Act the provision is: "Either party may take an appeal," etc. The term "as in other cases" is in connection with the phrase "and from the circuit court to the

supreme court, as in other cases," and as the statute of 1845 has been rewritten the phrase has no reference to the appeal from the county or probate court to the circuit court. The "bond with security" is to be fixed by the county or probate court when the appeal is to the circuit court, and is to be fixed by the circuit court when the appeal is to the supreme court "as the case may be." It is to be noted that the "bond with security is to be fixed by the court." In a court of record this requires an order of court. In appeals from justices the bond is fixed by law and is merely filed with and approved by the justice of the peace or the clerk of the court to which the appeal is taken. It requires no judicial act. The Act of 1845 from which section 124 descended, reads as follows:

"Sec. 138. Appeals shall be allowed from all judgments, orders or decrees of the court of probate to the circuit court in favor of any person who may consider himself or herself aggrieved by any judgment, order or decree of the court of probate, as aforesaid, and from the circuit court to the supreme court, as in other cases."

As we have seen, when the probate court was presided over by a justice of the peace appeals were taken in the manner of justices of the peace. Since the court of probate has become a court of record, the appeals should be taken in accordance with the statute and in a manner becoming the dignity of a court of record."

While there have been some contrariety of opinions in the early cases, it is the opinion of this court that appellant never perfected an appeal of the cause from the probate court to the circuit court of Sangamon County, and that the appeal should have been dismissed by the circuit court.

Coming to the merits of the controversy, appellant contends that the transaction represented merely an unexecuted gift and the beneficial interest in the note not intended to pass to appellee until the decease of Isabelle Cooney, if ever, rendered the provision testamentary and invalid under the statute of wills. Appellant contends there was no delivery or acceptance of the gift. It is conceded by all parties that the deceased intended and desired to give the principal of the note to appellee if she should die before the note became due. It was not intended as a gift *causa mortis*, for, while Isabelle Cooney was about eighty years of age when the note in question was executed, still she was in the enjoyment of good health of a woman of her age. But we think there is another principle operative in this case that counsel on neither side have fully developed. By the Act of 1919 the Legislature did not expressly abolish joint tenancies with the right of survivorship in personal property, but it passed an act providing as follows:

“Except as to executors and trustees and except also where by will or other instrument in writing expressing an intention to create a joint tenancy in personal property with the right of survivorship, the right or incident of survivorship as between joint tenants or owners of personal property is hereby abolished and all such joint tenancies or ownships shall, to all intents and purposes, be deemed tenancies in common,” etc., except as to deposits in banks, etc. Sec. 2, chap. 76, Rev. Stat.

The note in question, being an instrument in writing, does not in any manner express an intention to create a joint tenancy with the right of survivorship, as “joint tenants have one and the same interest accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession,” 2 Blackstone, 179.

At no time was the interest of Isabelle Cooney and appellee in said note the same. By the terms of said note the interests were diverse and the beneficial interests commenced, or rather accrued, conditionally at different times. This note had no terms that affected executors or trustees, and did not express an intention to create a joint tenancy. The full purpose of this statute was to abolish the incident of survivorship, except as to executors, trustees and where "by will or instrument in writing, expressing an intention to create a joint tenancy," etc. but the statute further reads, after abolishing the incident of survivorship: "And all such joint tenancies or ownerships shall, to all intents and purposes, be deemed tenancies in common." It may be said that although the instrument in writing did not express an intention to create a joint tenancy, yet, that in some manner, by gift, contract, trust or otherwise, about which in this case there has been a great deal of contention, the note or "instrument in writing" did vest appellee with some kind of an interest in the note, which by the statute, has ripened into a tenancy in common. The answer to this is complete. The fund and indebtedness for which the note in question was given was the property of Isabelle Cooney. The note in question was made payable to "Mrs. L. C. Cooney (Isabelle Cooney) or William Maher in event of the death of Mrs. L. C. Cooney." Appellee had no interest in the subject matter except by the "gift" or "novation" attempted to be made by this note. Appellee's only possible interest in the subject matter could accrue by his wife surviving that of Isabelle Cooney's life. If appellee died first, the note would be paid to Mrs. L. C. Cooney and that would end the matter. If Isabelle Cooney died first then appellee would take by right of survivorship and by that right only. But we have seen that the Legislature passed this act

for the very purpose of avoiding the evil of the right or incident of survivorship and abolished the same, except in the instances pointed out, and therefore appellee never entered into the ownership of said note in any manner. Except for the statute quoted and the laws of the State, under the proofs submitted appellees' interest could be established on the theory of contract and novation, as under the statute the law is applied to bank deposits payable to two or more persons, and by survivorship.

Appellee in this cause has filed a cross-error and brought the record of the Circuit Court of Sangamon County by bill of exception, taken in apt time, to this court, assigning error on the ground that the Circuit Court of Sangamon County did not dismiss appellant's appeal from the probate court to the circuit court. Appellee, appearing specially in the circuit court, at his first opportunity moved to dismiss the appeal of appellant to that court. From what has been said it is the opinion of this court that the circuit court erred in not dismissing appellant's appeal from the probate court, and appellee can properly raise that question on his assignment of cross-error. Sec. 107, chap. 119, Revised Statutes. In **Pelouze v. Slaughter**, 241 Ill. 224, the court held:

“The purpose of the statutory assignment of cross-errors is to enable the court to finally decide the controversy without necessitating a separate appeal or writ of error. Formerly there was no right to assign cross-errors, but any party deeming himself aggrieved by a judgment or decree was compelled to take an appeal or sue out a writ of error. An appellee or defendant in error was not allowed to assign cross-errors except with the consent of the appellant or the plaintiff in error. (**Smith v. Sackett**, 15 Ill. 528.) In **Carter v. Moses**, 40 Ill. 55, the

appellee asked leave to assign cross-errors, but the court said that in a chancery case an appeal brought the whole case before the court and it would be considered upon its merits without the assignment of cross-errors. In any case a party was permitted to prosecute a writ of error although the opposite party had appealed from the same judgment, and one of the proceedings did not affect the other but both might progress at the same time. (*Harding v. Larkin*, 41 Ill. 413.) In 1869 an act was passed which provided that the appellee or defendant in error should have the right to assign cross-errors, and the court should proceed in the disposition of the case in the same manner as when cross-errors were assigned by consent. (Laws of 1869, p. 163.) Afterward, in *Page v. People*, 99 Ill. 418, where the question arose on demurrer to a plea in bar of the writ of error, it was held that it was optional with an appellee or defendant in error to assign cross-errors or prosecute an appeal or writ of error separate and independent of that of his adversary; that if a party assigned cross-errors he could not afterward prosecute a writ of error upon the same record, but if he did not assign cross-errors he was not barred from prosecuting a writ of error. In general, the cases holding that a party can only protect his right by assigning cross-errors have been where the decree or judgment did not give the party all the relief that he claimed or gave to his adversary more than he was considered entitled to, and where the appellee or defendant in error might have taken an appeal or prosecuted a writ of error."

It is only in cases of this kind where parties join in trying the cause in the circuit court without any objection to the jurisdiction of the court that they are held to have waived the error. (*Grier v. Cable*, 159 Ill. 31; *Stafford v. Stafford*, 299 id. 445; *Wabash R. Co. v. People*, 196 id. 611; *Eggleston v.*

Royal Trust Co. 192 id. 102; **Chicago Portrait Co. v. Crayon Co.** 217 id. 202; **Jenkins v. Congreve**, 92 Ill. App. 271.) And in **Bennett v. Karasik**, 164 Ill. App. 362, the court held: "If a party relies upon a waiver to the question of jurisdiction upon failure to file an appeal bond in apt time, he must show by the bill of exceptions that some step was taken prior to the motion to dismiss which effected such waiver."

From what has been said, it is apparent that no appeal was actually taken and perfected in accordance with the requirements of the statute from the judgment of the Probate Court; that the Circuit Court, therefore, was without jurisdiction to proceed to a trial of the case de novo.

The judgment of the Circuit Court is, therefore reversed and the cause remanded to the circuit court of Sangamon county, with directions to dismiss appellant's appeal to said court from the Probate Court.

Reversed and Remanded with Directions.

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Ba

General No. 8323

Agenda No. 11

APRIL TERM, A. D. 1929

Frank B. Coleman, Trustee, Otis D. Leach, Flora V.
Leach and William Coulthard, Appellants,
vs.

Robert R. Doherty, Impleaded with Edwin M. S.
Crider et al, Appellees.

Appeal from the Calhoun County Circuit Court
SHURTLEFF, J.

This is a bill in equity brought by Frank B. Coleman, Trustee, Otis D. Leach and other note holders against Robert R. Doherty, appellee, impleaded with M. S. Crider and others to correct the description of lands in a trust deed, bill filed to the May term, 1928, of the Calhoun County Circuit Court. The bill averred the execution of a trust deed in the nature of a mortgage by Matthew E. Cain and Julia Cain, his wife, on April 2, 1919, to said Frank B. Coleman, of certain lands in township number eight, south of range four, west of the fourth principal meridian in Calhoun County, Illinois, consisting of seven hundred acres and particularly described and including, "that portion of the southwest quarter of section six that lies north of the Sny Channel," all in said township eight, etc., to secure certain notes amounting in all to the sum of fifty-seven thousand dollars, held and owned by the complainants. On the same day for the recited consideration of seventy-five thousand dollars the said Otis D. Leach and his wife, by a warranty deed, had conveyed to the said Matthew E. Cain of the City of Streator of LaSalle County, the identical lands except the said "southwest quarter of section six," which Leach did not own but had included in said warranty deed the "southwest quarter of section number five," in said

township, which the grantor did own, but the "southwest quarter of said section five" was not included in the trust deed security executed by Cain and wife.

It appears that on the next day, April 3, 1919, Matthew E. Cain and his wife, Julia, by deed conveyed the said lands to Edwin M. S. Crider and Emma Z. Crider of the County of LaSalle for a recited consideration of \$128,000 and describing the said seven hundred acres of land as including the "southwest quarter of section five" that lies north of the Sny Channel," etc. The deed from Leach to Cain, with the other lands, described "that portion of the southwest quarter of section five that lies north of the Sny Channel." Each of the said deeds were recorded in the Recorder's Office of Calhoun County at about the time they were executed and delivered. The deed from Matthew E. Cain and Julia Cain to Edwin M. S. Crider and Emma Z. Crider contained the following recital:

"This conveyance subject to one certain trust deed of record dated April second, 1919 to secure the principal sum of fifty seven thousand (\$57,000.00) Dollars with interest at the rate of five (5 per cent) per cent per annum, payable semi-annually and due ten (10) years after date, privilege granted to makers to pay five hundred (\$500.00) Dollars or any multiple thereof on any interest paying date, which incumbrance said grantee assumes and agrees to pay subject to taxes for year 1919 and subsequent years, subject also to the terms and conditions of a deed of easement to the Sny Island levee drainage district dated and filed for record in Recorder's Office of Calhoun County, Illinois and recorded in Book..... at page granting, however, to said above named grantee, in this conveyance, and his assigns full rights of damage into said Sny Channel."

A contract between the Cains and Leach, dated March 19, 1919, was offered in evidence, over objection, and from this contract it would appear that Appellant Leach intended to convey to the Cains the southwest quarter of section five, which was conveyed, and did not intend to convey the southwest quarter of section six, which was included in the trust deed but of which the Cains had no title. A map of the Bay Creek Sub-District, in which all of these lands was situated, was introduced in evidence by complainants. This map did not include the southwest quarter of section six and as Appellant Leach testified: "The Sny seems to be represented as occupying a greater portion of the southwest of five than it actually does occupy, and in that respect I believe it is not strictly correct. It, however, correctly shows the general course of the Sny in that quarter." Leach testified that there were 156 acres in the southwest quarter of section five north of the Sny, while the map shows that nearly half of the quarter section lies south of the Sny Channel. Another witness testified that the Sny Channel flowed north and south and there is testimony in the record that the channel of the Sny was sometimes in one place and sometimes in another, and at times covered the whole territory, so that little light is afforded as to the location of these quarters from the course of the Sny Channel. Nothing is shown as to the depth or width of this channel in its usual or ordinary course, but at flood it appears to cover the surface everywhere. One witness testified that the southwest quarter of section six, or a portion of it, was in the Mississippi River. No question as to the description of these lands with the Sny Channel is raised by either party to this cause.

On October 15, 1921, Appellee Doherty recovered a judgment against Edwin M. S. Crider and Emma Z. Crider in the Circuit Court of Grundy County for the sum of \$5627.50. The testimony shows this was a valid judgment recovered upon a **bona fide** debt.

No execution was issued or action taken upon this judgment in Grundy County. Upon April 27, 1922, Appellee Doherty caused a transcript of this judgment to be filed with the clerk of the Circuit Court of Calhoun County and recorded in that county. Upon October 28, 1925, an execution was issued out of the clerk's office of Calhoun County and placed in the hands of the sheriff of Calhoun County, which execution was returned later "not satisfied." Two other executions were issued out of the clerk's office of Calhoun County, one upon December 22, 1925, and another upon May 25, 1926, and placed in the sheriff's hands and a small amount was recovered upon one or both of them from personal property, by the sheriff of Calhoun County. Upon November 30, 1926, a fourth execution was issued out of the clerk's office of Calhoun County and the sheriff levied upon the said southwest quarter of section five, as described, on February 23, 1927.

Appellee Doherty answered the bill of complaint, denying all knowledge, actual or constructive, as to any error of descriptions in said trust deed, as charged, and claimed a lien upon said lands from the date of the first execution issued out of the clerk's office of Calhoun County on October 28, 1925, and denied the right of appellants to a decree amending and correcting said trust deed as against the interest of said Appellee Doherty. It appears that Emma Z. Crider had died before the decree was entered in this cause and that prior to her decease she had become insolvent and her estate had passed into the hands of the bankruptcy court. She is represented in this suit by Henry Baker, Jr., trustee.

The cause was referred to the master in Chancery to take the proofs and submit them to the court without recommendation, and upon that being done and the parties fully heard, the court entered a decree as follows:

That Robert R. Doherty, appellee, is the holder of a lien upon and against the undivided one-half of the Southwest Quarter of Section Five as described, Calhoun County, Illinois, under his judgment and execution thereon, the latter being dated November 30, 1926, and the levy thereof, on the undivided one-half of said Southwest Quarter of Section Five, which is prior and superior to the right and title of complainants under their trust deed.

And it was decreed that the deed of trust, dated April 2, 1919, from Matthew E. Cain and Julia Cain to Frank B. Coleman, trustee, for security of the indebtedness described in the trust deed and the record thereof, in Book 12 of trust deeds, in office of recorder of deeds be corrected to conform to the intentions of the parties in the following respects: that part of the description contained in trust deed and record thereof, reading as follows: "and that portion of the S W $\frac{1}{4}$ of Sec. 6, that lies North of the Sny Channel," is hereby stricken out of the said deed of trust, and record thereof, and the following description is substituted, in place of the words so stricken out, with like effect, as if substituted words and figures had already appeared in the deed of trust and record, that is to say: "that portion of the Southwest Quarter of Section numbered Five (5), that lies North of the Sny Channel," subject however, to the prior and superior right and interest of defendant Robert R. Doherty, appellee, under his judgment and execution thereon, dated November 30, 1926, and under levy thereon, on undivided one-half of Southwest Quarter of Section 5.

It was further ordered that the lien of Defendant Robert R. Doherty, appellee, upon the undivided one-half of the Southwest quarter of Section Five, under his judgment execution thereon, dated November 30, 1926, and levy thereof, on said undivided one-half interest, is prior and superior to rights of complainants to said undivided one half of said land under their deed of trust.

It was ordered that all costs be taxed against complainants and execution issue.

Appellants presented their exceptions to the chancellor which were overruled and the decree entered. They have brought the record to this court by appeal.

There is some testimony in the record, contradicted by appellee and his witnesses, tending to show that appellee had some knowledge of the error in the deed to Cain, acquired after the filing of the transcript of judgment in the office of the circuit clerk of Calhoun County on October 28, 1925, and prior to the actual levy upon the lands under the execution issued November 30, 1926, and levy made on February 23, 1927. Appellants contend that appellee never acquired any lien upon any part of the Southwest quarter of section five until the actual levy made upon the lands by execution on February 23, 1927, and cite **Todd v. Todd**, 214 Ill. App. 282. This contention grows out of a misapprehension of just what the court did decide in *Todd v. Todd*, *supra*. In that case the court had before it the question of the lien of an execution from one county sent to the sheriff of a foreign county. In this case a transcript of the judgment was transferred from Grundy County to Calhoun County and the judgment became, in effect, a judgment of Calhoun County. Section one of chapter 77 of the Revised Statutes provides that:

“A judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained, situated within the county for which the court is held, from the time the same is rendered or revived for the period of seven years and no longer,” etc. “Provided * * * and upon the filing in the office of the clerk of any court of record in any county in this state of a transcript of a judgment or decree rendered in any other county of this State, such judgment shall have the like force and

effect and shall be a lien upon the real estate of the party against whom the same is obtained, in said county where filed, and execution may issue thereon in said county in like manner as in the county where originally obtained." This language is so plain that it needs no construction. From this we deduce that that the lien of the judgment continues only for the period of seven years from the date of the original judgment, except for the purpose of sale, as further set out, regardless of the filing of the transcript in another county. There is a further proviso:

"When execution is not issued on a judgment within one year from the time the same becomes a lien, it shall thereafter cease to be a lien, but execution may issue upon such judgment at any time within seven years and shall become a lien on such real estate from the time it shall be delivered to the sheriff or other proper officer to be executed." No execution was ever issued upon this judgment in Grundy County, and construing the statute in relation to the transcript of judgment filed in Calhoun County as having the like force and effect upon the transcript of judgment and a lien, etc., as it has upon the original judgment, we must hold that appellee's judgment upon the filing of the transcript in Calhoun County remained and was dormant until the issuing of the execution thereon on October 28, 1925. The judgment in Grundy County had become dormant. The transcript of judgment therefore, upon its filing in Calhoun County was dormant. If the issuing of an execution in Grundy County upon October 28, 1925, and placing the same in the sheriff's hands would have created a lien upon any lands which the judgment debtors owned in Grundy County, then the issuing of an execution in Calhoun County upon the transcript and placing the same in the sheriff's hands for execution, had a like force and effect, and became a lien upon any lands in Calhoun County which the

judgment debtors owned or of which they had title, and that lien would continue for the period of seven years from the date of the original judgment in Grundy County. The only exception to this rule is created by section six of the act, which provides that any lands levied upon within the seven years may be sold upon a **venditio rei exponas** at any time within one year after the expiration of said seven years. Doubtless in any event, in this case the judgment creditor could not have obtained a lien upon any lands in Calhoun County without the issuing of an execution in Calhoun County. A confusion in this case is doubtless caused by section 34 of the Act, which provides:

“When a writ of execution is issued from a court of a county to a sheriff or other officer of another county and levied upon any real estate in the latter county, the officer making such levy shall make a certificate thereof and file the same in the office of the Recorder of his county. Until the filing of such certificate such levy shall not take effect as against creditors and **bona fide** purchasers, without notice.”

It is the opinion of this court that appellee's lien, by virtue of the execution, became effective upon October 28, 1925, unless there was some notice of the error or mistake contained in the records of which appellee should have been observant. **Dobbins v. First National Bank**, 112 Ill. 553. Appellee had no actual notice of any misdescription.

Does the recital in the deed given by Matthew E. Cain and wife to the Criders give notice of the error and mistake in the Cain trust deed by which appellee should have had notice of the situation? Under section thirty of the Conveyance Act the lien of a judgment attaches, in the absence of actual notice, not only to the interest which the judgment debtor may actually have in real estate, but to whatever interest the records disclose in

him, and a purchaser and a judgment creditor having a lien stand upon the same equity. (**Thorpe v. Helmer**, 275 Ill. 90; **Gary v. Newton**, 201 Ill. 170, 186; **Smith v. Willard**, 174 Ill. 538; **Massey v. Westcott**, 40 Ill. 163; **Martin v. Dryden**, 1 Gilm. 219.)

A complainant is not entitled to relief for a misdescription in his deed as against a **bona fide** purchaser from the grantor without notice, actual or constructive, of the grantee's right. (**Harms v. Coryell**, 177 Ill. 504.)

Appellee Doherty is a judgment creditor, and, in the absence of sufficient proof of actual notice, is entitled, to his lien upon whatever interest the records disclosed in Edwin M. S. Crider, the owner of an undivided one-half interest in the Southwest quarter of Section five. He stands in the position of a purchaser, and, in the absence of notice, in the position of a **bona fide** purchaser. Doherty was not a party to the original transaction, but is a third person. It is a well settled doctrine of equity that no relief will be granted against a third person holding rights acquired in good faith. (**Knobloch v. Mueller**, 123 Ill. 566.) It naturally follows that unless actual or constructive notice was had by Doherty before his lien attached, the decree must be sustained. (**Massey v. Westcott**, *supra*.)

The trust deed, instead of describing "that portion of the southwest quarter of section five that lies north of the Sny," describes "that portion of the southwest quarter of section six that lies north of the Sny." The record of an instrument affecting the title to land is constructive notice only so far as the land is correctly described, unless it is apparent from the record itself that there is a misdescription. (**Thorpe v. Helmer**, *supra*; **Slocum v. O'Day**, 174 Ill. 219; **Leeser v. Kibort**, 243 Ill. App. 262.) In all three of the cited cases the error was as to the section number the same as in the case at bar.

The search of the records required by appellee or any other purchaser is summarized in Pomeroy's Equity Juris prudence, vol. 2, (4th ed.) p. 1304, cited in *Leeser v. Kibort*, 243 Ill. App. 262, as follows:

“ ‘How far back is a purchaser bound to search the record title of his own vendor? If the records show a good title vested in the vendor at a certain date, and nothing done by him after that time to impair or encumber the title, it would seem that the policy of the registry acts is thereby accomplished; the purchaser is protected; he is not bound to inquire farther back, and to ascertain whether the vendor has done acts which may impair his title prior to the time at which it was vested in him as indicated by the records. This view is supported by many decisions,—it seems by the weight of authority,—which hold that a purchaser need not prosecute a search for deeds or mortgages made by his own vendor, farther back than the time at which the title is shown by the records to have been vested in such vendor; or in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor made prior to that time.’ ”

Where recitals are contained in a deed in a party's chain of title he will be presumed to have seen and read them. (*Russell v. Ransom*, 76 Ill. 167; *Snyder v. Pardridge*, 138 id. 173; *Kirby v. Judy*, 286 id. 200.) It is further held that: “ ‘One having notice of such facts as would put a prudent man on inquiry is chargeable with knowledge of other facts which he might have discovered by diligent inquiry.’ ” *Blake v. Blake*, 260 Ill. 70; *Bent v. Coleman*, 89 id. 364; *Citizens' Nat. Bank v. Dayton*, 116 id. 257; *Morrison v. Miles*, 270 id. 41; *Southern Ill. Nat. Bank of East St. Louis v. Thaxton*, 224 Ill. App. 554, and *Thorpe v. Helmer*, 275 Ill. 86,” all cited in *Coleman v. Mulcahey*, 242 Ill. App. 465. We have stated the case as strongly as it can be stated upon the law.

No proofs are offered tending to show that appellee had any actual notice or any notice of the error until after his judgment had become a lien upon the lands in question on October 28, 1925. Appellee, or his agent, examining the record title to these lands in the chain of his "vendor's" title would find the deed to the Criders containing the recital: "This conveyance subject to one certain trust deed of record, dated April 2, 1919, to secure the principal sum of \$57,000," and the recital proceeds to give the rate of interest, date of maturity and privilege of payment on principal and the assumption clause. The assumption clause is a mere personal obligation and does not affect the title of the lands. It is to be noticed that "this conveyance" is made subject to the trust deed and no particular lands are pointed out. The deed containing the recital conveyed the north one-half of section five; the north-east quarter of section six that lies east of the Sny Channel; that portion of the northwest quarter of section six that lies east of the Sny Channel; that portion of the southeast quarter of section six that lies east of the Sny Channel, and that portion of the southwest quarter of section five that lies north of the Sny Channel. It is only the last described tract that is involved in this cause. This recital is sufficient to require an examination of the trust deed, which was of record. The trust deed in question conveyed the first four tracts, but omitted the last tract. The trust deed conveys an additional tract—that portion of the southwest quarter of section six that lies north of the Sny Channel. Of the seven hundred acres of land conveyed to appellee's vendor," the trust deed conveyed only about 560 acres, as it is stated. We see nothing about this to excite any one's attention. It is recited in the deed to the Criders, but the trust deed is not in appellee's chain of title. Neither is the title to any of the lands in section six in appellee's chain of title and he was not

required to examine the record of such lands. There is no indefinite description. The deed or the trust deed do not mention the occupancy of the land or any other circumstance that might or should excite appellee's suspicion or the suspicion of his agent. Many of the cases are founded upon some circumstance or condition that of necessity would excite suspicion, and due care on the part of a purchaser would lead to further inquiry. In this case there was no such circumstance or condition. Appellee merely had a judgment to collect, which, doubtless, was placed in the hands of an agent or attorney. We may conjecture, infer and imagine, but we find nothing from the records to excite our inferences and imaginations and neither constitutes proof. It is argued that because appellee caused two or three executions to be issued and sought only personal property upon which to levy, is some evidence that appellee knew the lands were, in equity, duly covered by the mortgage. It would be as cogent reasoning to assume that appellee pursued the course he did because he knew he had a valid lien upon the land.

Finding no error in the record that will warrant a reversal, the decree of the Circuit Court of Calhoun County is affirmed.

Decree affirmed.



TERM NO. 27.

AGENDA NO. 22.

STATE OF ILLINOIS.

APPELLATE COURT.

FOURTH DISTRICT.

MAY TERM, A. D. 1929.

FILED

JUL 26 1929

Robert S. S. S.
CLERK OF COURT

254 J.A. 627

HARRY SHAFFER,
DEFENDANT in Error,

APPEAL FROM FRANKLIN CIRCUIT

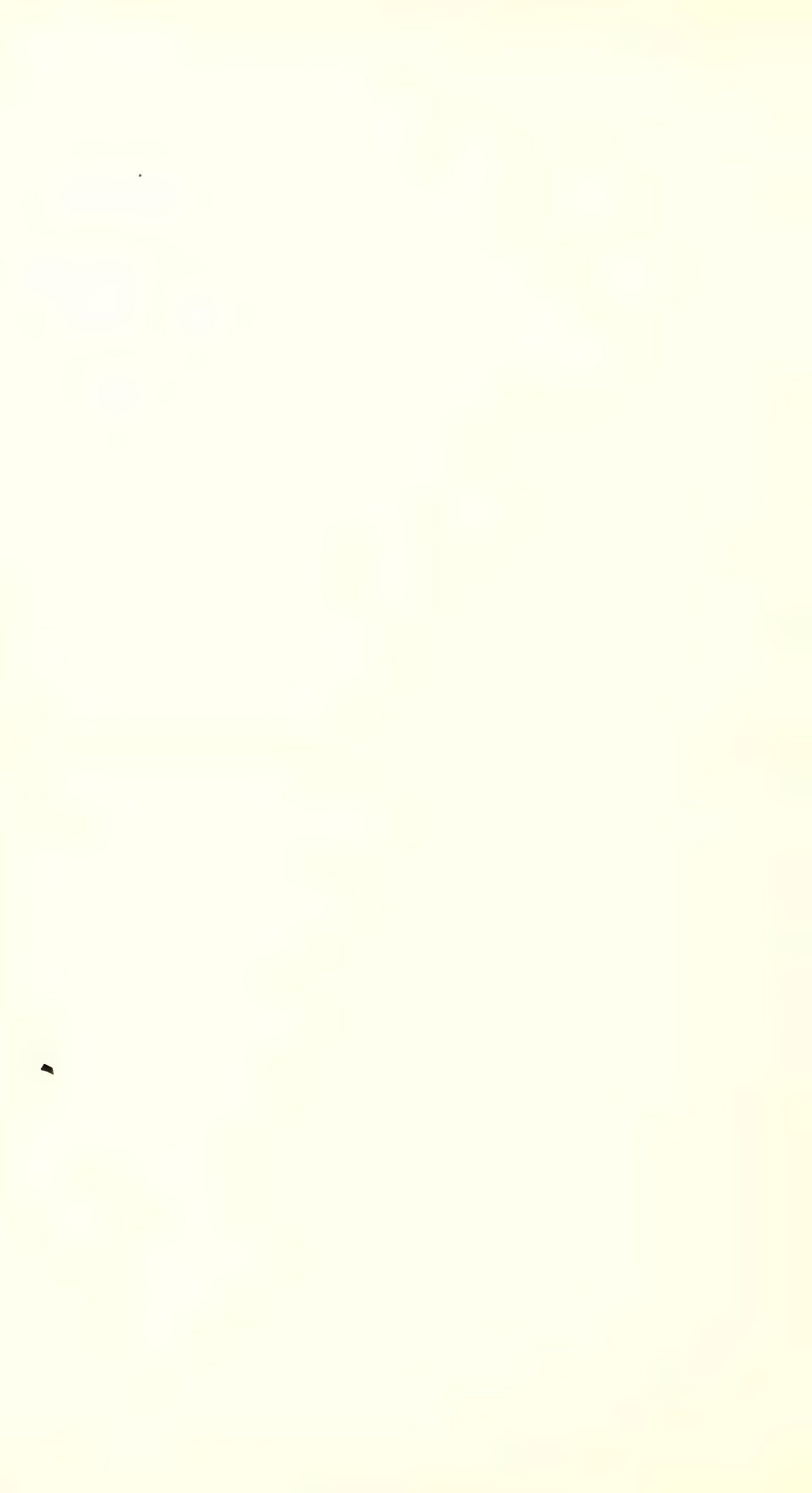
V.

COURT.

REUBEN TEFFERTILLER,
Plaintiff in Error.

BARRY, P.J.:—Defendant in error recovered a verdict and judgment for \$1,000.00 for criminal conversation. Plaintiff in error contends that the court erred in putting the case on the trial docket before the issues were settled, in violation of a rule of the court. If the trial court has such a rule it was not preserved in the bill of exceptions and cannot be considered. Neither the motion to strike the cause from the trial calendar nor the rule of court are shown in the abstract. So far as it appears from the abstract plaintiff in error voluntarily entered upon the trial of the case.

His next contention is that the evidence is insufficient to support the verdict. The evidence, as abstracted, is insufficient but the most material parts of the testimony of the witnesses May Wilson and Roso Towers are not abstracted. We are



of the opinion that the testimony of these two witnesses was simply sufficient to warrant the jury in returning a verdict of guilty, especially in view of the fact that their testimony was not denied by plaintiff in error.

In a jury trial, if it is desired to save for review the question of the sufficiency of the evidence to sustain the verdict, the losing party must make a motion for a new trial, and, upon its being overruled, except to such ruling, and include such motion, the order overruling the same and his exception thereto, together with the evidence, in the bill of exceptions; *Farber v. Chicago & Alton Ry. Co.*, 235 Ill. 589; *People v. Gabrys*, 329 Ill. 101.

In the case at bar the motion for a new trial and the ruling of the court thereon were not preserved in the bill of exceptions and for that reason alone the question as to the sufficiency of the evidence to support the verdict is not properly before this court. For the reasons aforesaid the judgment is affirmed.

AFFIRMED.

Not to be reported.

FILED

JUL 26 1929

Robert S. Rupp
CLERK OF THE APPELLATE COURT

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1929.

TERM NO. 3.

AGENDA NO. 2.

EVA BRACKEN & HUGH BRACKEN, :
Appellees, :

VS.

CLARENCE GIBSON, Executor of :
the Estate of WALKER WINTER, :
Deceased, Appellant.

: APPEAL FROM THE CIRCUIT
: COURT OF EFFINGHAM COUNTY.

NEWHALL, J.

Appellees filed a claim in the County Court of Effingham County against the Estate of Walker Winter, Deceased. The claim was for services rendered to the decedent, including board, room, lodging, nursing, and for money expended for repairs and improvements on decedent's farm property. The services rendered extended over a period of about three years from March, 1923, to May, 1926. The amount of the claim filed was \$1383.00. Trial was had in the County Court, which resulted in a verdict in favor of appellees for the amount of the claim. The case was then appealed to the Circuit Court where on another jury trial verdict was rendered for appellees in the sum of \$900.00. This appeal is prosecuted to reverse the judgment of the Circuit Court.

The evidence offered on behalf of appellees shows that appellee, Eva Bracken, was the daughter of Walker Winter, and that, after the death of the wife of Walker Winter, in the year 1923, appellees were requested by the decedent, Walker Winter, to move from their home in Christian County to the farm of decedent in Effingham County for the purpose of taking care of the decedent in his declining years. This arrangement was evidently consummated as a result of the letter written by the

Term No. 3.

decedent to his daughter in March, 1923, wherein the decedent requested his daughter and her husband, Hugh Bracken, to come from their Christian County home upon the promise that the place upon which decedent resided, consisting of a farm of 117 acres, would become the property of appellees. In this letter Walker Winter stated that all he wanted was a home as long as he lived, a place to stay, and his living, with the right to go and come as he pleased. Proof offered on the part of appellees tends to show that they moved on to the farm of the decedent soon after the writing of the above mentioned letter, and that from thence until some time in the month of May, 1926, they furnished a comfortable home for the decedent, looked after his wants and needs, took care of him during his illness, and made sundry repairs upon the farm amounting to the sum of \$235.00. A large number of witnesses testified in the case as to the value of the services rendered by appellees to decedent, and as to the value of the improvements placed upon the farm in question.

Appellant contends that appellees and the decedent lived together as one family, and that, in such a case, an agreement to pay for services must be established either by proof of an express contract or by facts from which an inference of such an agreement would arise.

Appellant further contends that, because of the letter written by the decedent to appellees, there was an express contract between the parties, and that appellees are not entitled to recover for services rendered, as claimed by their claim filed in the County Court.

The law is well settled that compensation for such services may be recovered if a reasonable inference arises from the evidence that an understanding existed between the parties, by which the claimant was to receive pay for services rendered. (See *Hudson v. Hudson*, 218 Ill. App. 559, and the

cases therein cited.)

A contract may be established by the facts and circumstances in the evidence, which show that, when the services were rendered, both parties expected them to be paid for, the one expecting to receive payment for such services, and the other to make the payment for such services. (See *Heffron v. Brown*, 155 Ill. 332.)

Appellant contends that the only recovery would be according to the terms of an express contract. While it appears from the statement in appellee's brief that certain proceedings were instituted on the chancery side of the Circuit Court for the specific performance of this contract, yet there is nothing in the record to indicate the result of such proceedings.

Under the holdings of the Supreme Court referred to in the case of *Crawley v. Crawley*, 223 Ill. App. 394, on page 398, it was held that claimants had a right to file a claim in the County Court while, at the same time, proceedings were pending in the Circuit Court for the specific performance of a contract, and that it was merely a legal protection to have a remedy to secure some remuneration for services performed in the event of the failure of a specific performance case.

After careful consideration of all of the evidence in the record, which is quite voluminous, we are of the opinion that competent evidence therein amply supports the claim of appellees.

Appellant also complains because of the refusal of two instructions offered by him. These instructions left out important elements upon which appellees' claim was based, and the instructions given on the part of appellant fully advised the jury as to the law, and we are of the opinion that the Court did not commit reversible error in the refusing of these instructions offered on behalf of appellant.

Appellant also complains that the jury did not

give consideration to certain notes signed by appellees, which were offered by appellant by way of set-off. It is apparent from the amount of the verdict rendered in the Circuit Court that the jury did give consideration to appellant's claim of a set-off.

Appellees filed cross-errors claiming that the trial court erred in assessing one-third of the costs incurred in the Circuit Court and the County Court against appellees. It appears from the record that the executor had appointed the May Term, 1928, for adjustment of claims, and that appellees failed to present their claim at the May Term fixed by the executor, and did not file their claim until July 14, 1928.

Section 63 of Chapter 3 of the Revised Statutes (Administration of Estates) provides that, where a claim is not presented at the time fixed for adjustment of claims, the estate shall not be answerable for costs of such proceedings, with a provision that when a defense is made, the Court may, if it shall deem best, order the whole or some part of the costs occasioned by such defense to be paid out of the estate. A large number of witnesses were offered by appellees to prove their claim both in the County Court and in the Circuit Court, and there is nothing in the record which shows that the trial Court abused its judicial discretion in assessing one-third of the costs against appellees, and in the absence of such showing we would not be warranted in allowing appellees' cross-errors.

For the reasons aforesaid, we are of the opinion that the judgment of the Court below should be affirmed, which is accordingly done.

AFFIRMED.

Not to be reported.

FILED

JUL 20 1929

 RECEIVED
 CLERK OF THE COURT
 STATE COURT
 FOURTH DISTRICT
 ILLINOIS

STATE OF ILLINOIS
 APPELLATE COURT
 FOURTH DISTRICT
 MAY TERM, A. D. 1929.

TERM NO. 14.

AGENDA NO. 5.

AUGUST DALLAPE and
 BERTHA DALLAPE,

Appellees,

VS.

STANDARD OIL COMPANY, (INDIANA) :
 a Corporation,

Appellant.

APPEAL FROM THE CIRCUIT

COURT OF FRANKLIN COUNTY.

NEWHALL, J.

This is an appeal by appellant from a judgment of \$150.00 rendered against it in the Circuit Court in favor of appellees.

The case was tried before a jury on the first count of the declaration, which alleged that the defendant negligently permitted oil, water, and other refuse kept on its premises in the conduct of its business to drain upon and over certain premises of appellees, thereby causing damage rendering appellees' premises unfit for cultivation, habitation, or the conduct of any business thereon.

The evidence shows that appellant in the year 1917 constructed its bulk oil plant in the southeast part of the City of Benton, which plant consisted of a warehouse, garage, pump house, and other tanks surrounded by dikes; that the natural drainage from appellant's property is to the southeast over and across the property of appellees, which lies immediately east of appellant's property.

Appellees acquired their property in April, 1925, and moved on to the premises in May, 1927. The premises at the time of their acquisition by appellees, were vacant, and it appears that they moved a house on to the premises in the year

1927, in which appellees thereafter lived.

Before the trial, by agreement of parties, the jury were permitted to view the premises of both the appellees and appellant. Appellee, August Dallape, testified that there was a blockhouse on the premises, which was built in the year 1923, and which had been used for manufacturing cement blocks; that appellant maintained upon its premises, close to appellees' premises, certain tanks filled with oil and gasoline, which were surrounded with cement and dirt dikes; that appellee, August Dallape, discontinued making cement blocks on the premises because of the drainage across his premises from those of appellant; that certain of the dikes maintained by appellant were leaky, and that the oil and grease from appellant's premises ran over and upon the premises of appellee, causing destruction of vegetation and in warm weather a stench from oil and gasoline; that the reasonable rental value of appellees' property was \$150.00 per year.

Other witnesses offered on behalf of appellees tended to corroborate the claim of appellees that oil and gasoline were permitted to flow from appellant's premises over and across the premises of appellees.

Witnesses testified on behalf of appellant that appellees' premises were not damaged in their opinion, and that the oil that did flow from appellant's premises upon those of appellees was very slight in quantity and occasioned no substantial damage.

Appellant contends that the judgment of the trial court should be reversed because the evidence does not show that appellees' property was damaged. In view of the conflicting evidence in the record as to the nature and extent of the damages suffered by appellees by reason of the alleged seepage of gas and oil upon appellees' premises from that owned and controlled by appellant, we are of the opinion that it was a question of fact

...the ...

for the jury to determine, under proper instructions by the Court, and, after careful consideration of the evidence and record, we do not feel warranted in disturbing the verdict of the jury. The jury were amply instructed as to the law in the case, and no complaint is made in that regard.

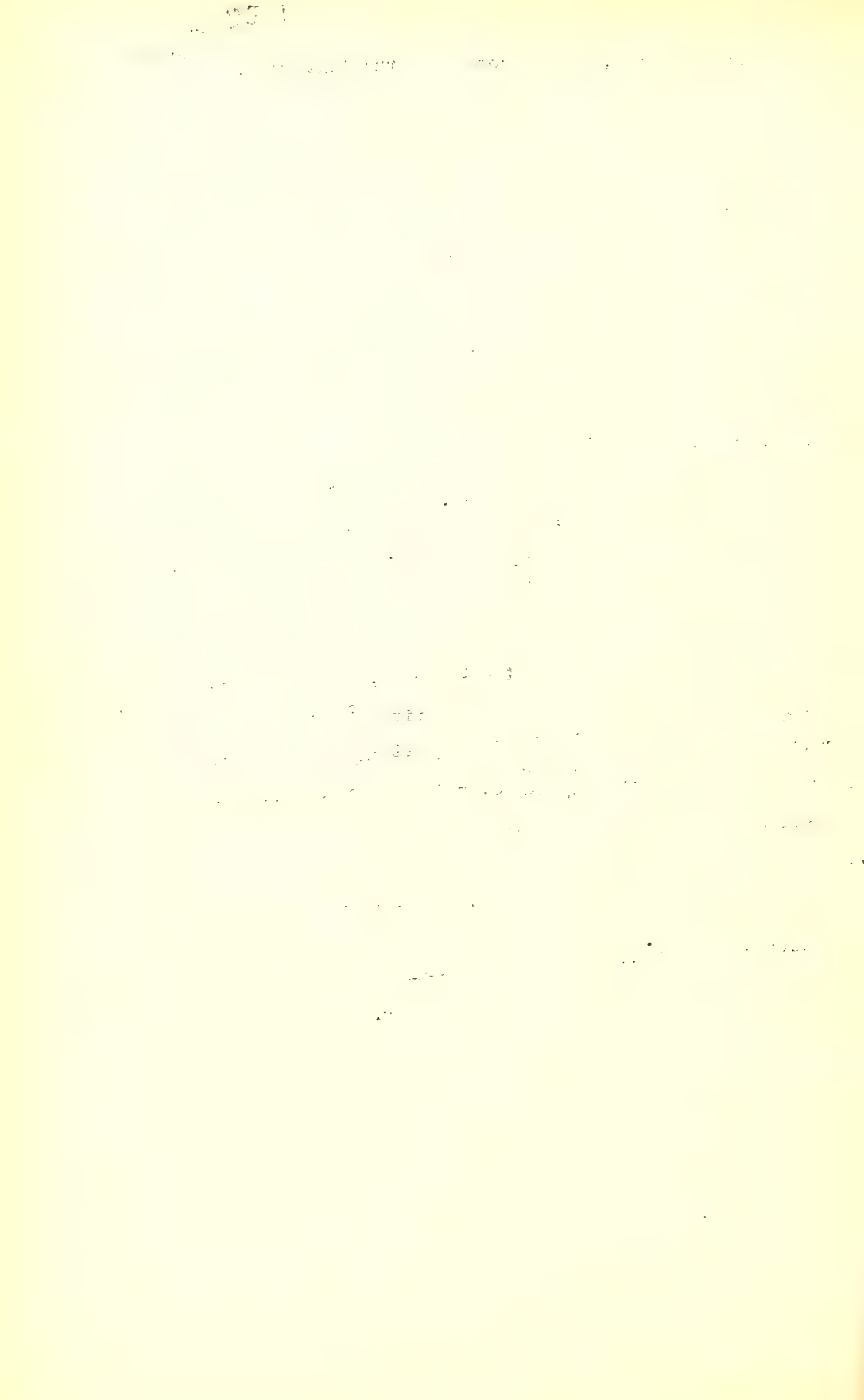
Appellant concedes the law to be that it is the duty of the owner of property to use his land in such a way as not to injure adjacent property, and that, if appellant negligently or carelessly permitted oil and grease to seep across and upon appellees' land, there would be liability for damages occasioned thereby.

Appellant complains that the trial court erred in refusing to permit the introduction of the ordinance authorizing the construction and maintenance of appellant's warehouse, tanks, and other buildings necessary for its business. There was no error in the refusal of this evidence, for it was conceded on the trial, and the Court so instructed the jury, that the business operated by appellant was a lawful and legitimate business. Other minor errors in the admission of certain testimony on the part of appellees' witnesses are objected to, but we do not regard the admission of such evidence as being prejudicial to appellant's case.

For the reasons aforesaid, the judgment of the Court below is affirmed.

AFFIRMED.

Not to be reported.



FILED

JUL 20 1929

Robert B. Roe
CLERK OF THE APPELLATE
FOURTH DISTRICT

STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM, A. D. 1929.

TERM NO. 16.

AGENDA NO. 29.

MYRA TURBAVILLE,
Defendant in Error.

VS.

HARRY V. HANDLEY, Jr., and
HERBERT W. HANDLEY, Executors

of the Estate of HARRY V.
HANDLEY, Deceased.
Plaintiffs in Error.

254 I.A. 627⁴

ERROR TO THE CIRCUIT

COURT OF ALEXANDER COUNTY.

Newhall, J. This is a writ of error prosecuted by plaintiffs in error to review a judgment of \$1,500.00 in favor of defendant in error rendered against plaintiffs in error testate, Harry V. Handley.

The declaration filed consisted of the common counts under which Myra Turbaville sought to recover from her brother, Harry V. Handley, the sum of \$1,500.00, the value of certain receipts held by her representing her homestead and widow's award in her husband's estate, together with interest thereon and certain items for board and room furnished her said brother.

Defendant in the court below filed a plea of set-off claiming that there was due to him certain rents and moneys advanced on account of improvements on plaintiff's home and for other personal advancements. A trial was had before a jury and a verdict returned for

Term No. 16.

\$1,500.00 and after motion for new trial was overruled judgment was entered.

Joseph Turbaville died intestate on the 23rd of May, 1925, leaving surviving him Myra Turbaville, his widow, plaintiff in the trial court, and the deceased's estate was administered upon in the County Court of Pulaski County. The deceased left certain debts at the time of his death and it became necessary to sell the real estate to pay debts. Proceedings to sell were instituted by the Administrator. Prior to his death the deceased and his wife had given a mortgage on the real estate, the same being the home in which they resided at Mounds, Illinois. Harry V. Handley, defendant in the trial court, purchased the mortgage and was the owner thereof at the time the property was sold by the Administrator on April 10, 1926.

At the Administrator's sale Handley purchased the property in question for the sum of \$3,600.00. Prior to the sale Handley procured from his sister, Myra Turbaville, two receipts, one for the sum of \$1,000.00, which had been issued to her for her homestead interest in said property, and the other receipt for the sum of \$500.00, which had been issued to her on account of her widow's award allowed in said estate. With these receipts in his possession Handley made settlement with the Administrator on account of the sale, being given credit for the amount of his mortgage, turning in the receipts for \$1,500.00 and paying the balance in cash.

Some time after the sale Handley came to the home of his sister and roomed and boarded there until some time after the first of the year 1927. On February 21, 1927, Handley served notice upon his sister to vacate the

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home and demanded that he would charge his sister rent at the rate of \$60.00 per month from and after the date of said notice. Handley and his sister prior to the service of the notice had been upon friendly terms and it appears from the evidence that he had furnished her sums of money from time to time with which to furnish the home; that at or about the time of the service of the notice disputes arose between them and sometime after the service of the notice Myra Turbaville began the present suit to recover the value of the receipts which she had delivered to her brother, together with certain claims for board and lodging.

Myra Turbaville, the plaintiff in the court below, testified that prior to the administrator's sale the brother had agreed that if she would lend him the money that was due upon the \$1,500.00 receipts in question that he would buy the property and give his sister a home and that he would live with her; that pursuant to this arrangement the sister turned the receipts over to her brother which were used by the brother as a cash credit with the administrator and that after the sale the brother remained with his sister in the home so purchased for a period of about seven months.

Harry V. Handley, the defendant in the court below, testified and admitted that his sister had given him the receipts in question which were used by him in making settlement with the administrator but denied that he had ever promised to pay her anything for the receipts and admitted that he did say that he was going to buy the property for himself and his sister and that he did not expect that his sister would charge him for board and that he did not expect or intend to charge her for the moneys that he had

Term No. 16.

previously given her for provisions and household necessities. The sister testified that the amount due her as she claimed was \$1,500.00 for the receipts together with interest thereon of \$112.50 and \$280.00 for board, making a total of \$1,892.50. The defendant testified that he had advanced various items of cash to his sister and had purchased certain household articles for her which together with what he claimed to be a reasonable rental value for the premises would aggregate about \$1,800.00.

The principal grounds urged for reversal of judgment are errors of the court in the giving and refusing of instructions and in the failure to grant a new trial on account of the verdict being excessive and that the verdict is contrary to the law and the evidence in the case.

Plaintiffs in error contend there can be no recovery in this case under the common counts for the \$1,500.00 of receipts which were turned over by Myra Rurba-ville to her brother and used by him in purchasing the property in question at the administrator's sale.

It is not necessary in an action for money had and received that the defendant actually received the money which it is sought to recover but the action may be maintained where a credit or property has been received as the equivalent of money by the defendant. *Gordon v. Johnson*, 186 Ill. 31; *Fooselman v. City of Springfield*, 139 Ill. 185.

It was admitted by Handley that he did receive the receipts in question for the purpose of using the same in order to purchase a home for himself and his sister. The receipts were of money value to Handley and he did use them as part of the purchase price of the premises in question and if he had carried out his arrangement of purchasing a home for himself and his sister it may be that she could not

TERM NO. 16.

have recovered, but when he, having acquired title to the property, elected to evict her from the premises then in equity and in good conscience he was in duty bound to account to and pay her for the money value of these receipts.

It is also contended by counsel for plaintiffs in error that in view of the fact that the original mortgage on the premises in question had been signed by Myra Turbaville and her husband in his lifetime that thereby she had waived dower and homestead in the premises and that the receipts were of no value on that account. It appears from the record that the mortgagee received the full value of his mortgage at the sale and under the statute the widow is entitled to claim both dower and homestead in the excess of the value of the premises over and above the amount of the mortgage. However, there is no merit to this particular contention because Handley at the time of the sale in case he did not turn in \$1,500.00 of receipts which were owned by his sister would have been obliged to pay that much additional in cash to the administrator, in which event Handley's sister would have received the value of her homestead and widow's award in cash out of the distribution of the proceeds of the sale by the administrator.

It is contended by counsel for plaintiffs in error that the verdict was excessive, but neither in the motion for new trial or in assignment of errors filed in this court is this question raised.

Where a motion for a new trial is made and the grounds thereof are stated in writing the parties are limited to the errors alleged in the written motion and all other errors are deemed to have been waived. Chicago City Railway Co. v. Smith, 226 Ill. 178. The question of whether the damages awarded by a jury are excessive will not be con-

sidered on appeal where the question was not raised by the defendant in its motion for a new trial. *McClaren v. City of Gillispie*, 250 Ill. App. 53.

At the request of the defendant in the court below the jury were instructed that the plaintiff could not recover upon the items of board and lodging and it is evident that the verdict did not include these items or the item of interest which plaintiff claimed to be due for the use of the plaintiff's property in the receipts in question.

Plaintiffs in error complain because the defendant was not allowed by the jury the fair rental value of the premises occupied by the plaintiff as a set-off to the plaintiff's claim.

An action for use and occupancy is founded on contract, in the absence of which no recovery can be had, and will not lie if the circumstances of the case are inconsistent with the existence of the contract and necessarily rebut the implication of a promise to pay rent. 39 Cyc.851.

In view of the circumstance shown by this record and the family relationship which existed between the parties it was a question of fact for the jury to determine whether or not under all the circumstances it could be said there was an implied agreement for rent. We cannot say from the record in this case that the verdict of the jury upon that question is against the greater weight of the evidence.

Counsel for plaintiffs in error have not pointed out any specific errors in any instructions which were given for the plaintiff below or that there were any specific errors in the refusing of instructions offered by the defendant below and accordingly there is nothing for this court

TERM NO. 16.

to consider or decide on the giving or refusing of instructions.

For the reasons aforesaid we are of the opinion that the judgment of the court below should be affirmed.

AFFIRMED.

Not to be reported in full.

FILED

JUL 26 1921

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1929.

TERM NO. 9.

AGENDA NO. 15.

H. N. FINNEY,

Appellee,

VS.

L. R. HILLEARY,

Appellant. :

254 I.A. 627⁵

: APPEAL FROM THE CIRCUIT

: COURT OF SALINE COUNTY.

WOLF, J.

On the 23rd day of April, A. D. 1921, J. H. Brothers and Servannah Brothers, his wife, were indebted to L. R. Hilleary in the sum of four hundred and fifty dollars.

To secure this indebtedness they made and delivered to L. H. Hilleary their mortgage deed of that date, intending to convey by such mortgage the east half of the northeast quarter of the northwest quarter of Section 31, Township 10 south, Range 6 east of the Third Principal Meridian, in Saline County, Illinois. By mistake another and different tract of land was described in this mortgage.

On the 19th day of November, A. D. 1921, the same J. H. Brothers and Servannah Brothers, his wife executed, acknowledged and delivered to H. N. Finney a mortgage on the east half of the northeast quarter of the northwest quarter of Section 31, Township 10 south, Range 6 east of the Third Principal Meridian in Saline County, Illinois, with other land, to secure a note payable to the said H. N. Finney for three hundred dollars.

At the December Term, A. D. 1925 of the Circuit Court of Saline County, Illinois, L. R. Hilleary, mortgagee in the mortgage first above mentioned, filed his bill to foreclose his said mortgage against J. H. Brothers and Servannah Brothers, his wife, and H. N. Finney, appellee herein. The said L. R.

Hilleary alleging, among other things in his said bill to foreclose his said mortgage, the following statement of facts to-wit: On the 23rd day of April, A. D. 1921, J. H. Brothers and Servannah Brothers, his wife, being indebted to him in the sum of four hundred and fifty dollars, made, executed and delivered to him their certain promissory note of that date for said sum, payable three years after date; to secure said note, the said J. H. Brothers and Servannah Brothers, on the same day, made, executed and delivered to him their mortgage deed, intending to convey to him the east half of the northeast quarter of the northwest quarter of Section 31, Township 10, Range 6 east of the Third Principal Meridian in Saline County, Illinois; that said note and mortgage were executed and delivered by the said J. H. Brothers and Servannah Brothers for the purpose of securing from said L. R. Hilleary a loan to enable them to pay to H. N. Finney the purchase price of said premises, but by mistake mutual and common to both parties the premises were incorrectly described; that on the 19th day of November, A. D. 1921, the said J. H. Brothers and Servannah Brothers executed to H. N. Finney a mortgage on the east half of the northeast quarter of the northwest quarter of Section 31, Township 10, south, Range 6 east of the Third Principal Meridian in Saline County, Illinois, and other land, to secure a note for three hundred Dollars, due three years after date; that at the time of accepting and recording said mortgage the said H. N. Finney knew that said note of four hundred and fifty dollars was still unpaid, and that the mortgage given to secure the said note was still a lien on the property described in a deed made by J. H. Brothers and Servannah Brothers to H. N. Finney, bearing date January 23rd, A. D. 1922, and by said bill so filed by the said L. R. Hilleary he prayed that the mortgage deed, given by the Brothers to him to secure his said note, be corrected and reformed. He also prayed that the said mortgage given by J. H. Brothers and Servannah Brothers to

H. N. Finney be declared satisfied and discharged and no longer a lien against the property therein described, and that the defendants (Who are J. H. Brothers, Servannah Brothers and H. N. Finney), and all persons claiming under them, be absolutely and forever barred and foreclosed of and from all right and equity of redemption in and to the said premises described in said mortgage then sought to be foreclosed.

H. N. Finney, one of the defendants, appeared and put in his answer to Hilleary's bill to foreclose his mortgage. A trial was had upon Hilleary's bill to foreclose his said mortgage, Finney's answer thereto and Hilleary's replication to said answer, and the Court, upon said trial, after having heard the testimony, by its decree found that on the 19th day of November, A. D. 1921, J. H. Brothers and Servannah Brothers executed to H. N. Finney a mortgage on the east half of the northeast quarter of the northwest quarter Section 31 Township 10 south, Range 6 east of the Third Principal Meridian in Saline County, Illinois, to secure a note for three hundred dollars; that the said H. N. Finney, at the time of accepting said mortgage, did not have actual or constructive knowledge that the complainant L. R. Hilleary, had a lien on said land, and that, therefore, the said mortgage to the said H. N. Finney became a superior and prior lien on said premises to the lien of L. R. Hilleary, and ordered and decreed, among other things, that the defendants, J. H. Brothers and Servannah Brothers, pay to L. R. Hilleary the amount due him on his mortgage within ninety days from the date of said decree, and further decreed that in default in such payment that the defendants be forever barred and foreclosed from all equity of redemption of said land, and that all right, title and interest of the said J. H. Brothers and Servannah Brothers in and to said premises become vested in the said L. R. Hilleary, subject to the interest of H. N. Finney in said premises by virtue of the mortgage executed to him by the

said J. H. Brothers and Servannah Brothers on the 19th day of November, A. D. 1921.

H. N. Finney, appellee herein, filed his bill to foreclose his mortgage to the December Term, A. D. 1926, of the Saline County Circuit Court, and afterwards, on the 12th day of July, A. D. 1928, filed an amendment to his bill to foreclose his mortgage, by which amendment he set up all the facts concerning the foreclosure proceedings filed by L. R. Hilleary, and also the substance of the decree before that time entered by the said Court in the L. R. Hilleary foreclosure proceedings. He alleged in his amendment to his bill that the said L. R. Hilleary had an interest in the premises according to the decree entered in the Hilleary foreclosure proceedings; that the interest of said L. R. Hilleary was subject to the mortgage lien of the complainant, appellee herein; that the said L. R. Hilleary claimed to be the owner in fee simple, absolute, of the premises described in his mortgage, and also claimed that the mortgage lien of the appellee had been discharged and paid and canceled of record by the said H. N. Finney, appellee herein; and, by said amendment, the complainant averred that the matters so claimed by the defendant, L. R. Hilleary, were adjudicated, or should have been adjudicated in the former suit of L. R. Hilleary against J. H. Brothers and Servannah Brothers and the appellee herein, and that the said L. R. Hilleary was barred by the said former proceedings from making any such claims.

On the 23rd day of June, A. D. 1928, L. R. Hilleary appeared and answered complainant's bill as amended and by his said answer admitted all the matters and things set out in the amendment to the complainant's original bill filed in this proceeding, except that he denied that his interest in the premises was subject to the mortgage lien of H. N. Finney and averred that the mortgage of H. N. Finney had been discharged and that the decree in the former suit described in the amendment to

the complainant's bill did not adjudicate and should not have adjudicated the question as to whether a deed from H. N. Finney and wife to J. H. Brothers, dated January 23, A. D. 1922, concerning the mortgage which is here sought to be foreclosed.

Upon the hearing of the case the Chancellor found in favor of the complainant and among other things, as follows: "The Court further finds all the matters set forth in the answer of L. R. Hilcoary to the complainant's bill as amended herein were adjudicated by the Court in the former suit herein referred to; that the suit was between the same parties who are parties to this suit and involved the said identical issues that are involved in the present suit in-so-far as the same referred to L. R. Hilcoary, and that the said L. R. Hilcoary is by said decree in said former suit barred from making the defense set up by him as to the answer to the complainant's bill as amended herein."

The defendant Hilcoary excepted to the findings of the Court and has brought it to this Court upon appeal. While there are several assignments of error practically the only question involved is that part of the decree finding that the issues involved in this case are the same as in the former case and the defendant Hilcoary is barred from setting up the same matters in this suit.

If the parties in this proceeding were adversaries in the former proceedings then the appellant would be barred from raising the same questions in this proceeding. In a foreclosure suit only parties estopped by the decree are those who are adverse parties. To be such parties an issue must have been joined and such issues determined by the Court before the decree will be res adjudicata. (Miller vs. Schilling, 249 App. 290; Gouvons vs. Gouvons, 22 Ill. 223; Ryan vs. Hayes, 190 App. 208.

In the foreclosure proceedings filed by the appellant Hilcoary, J. H. Brothers, Servannah Brothers and the appellee H. N. Finney, were made parties defendant to the bill and

necessarily Hilleary and Finney were adversaries in that proceeding.

The complainant Hilleary in his bill for foreclosure charged that Finney's mortgage (the mortgage now being foreclosed) was not a valid and existing mortgage; and also that Finney was barred from saying that his mortgage was a just and valid mortgage on account of his giving a deed to the premises in question to J. H. Brothers and Servannah Brothers.

We are of the opinion that the learned trial Judge properly found that the matters set forth in the bill of complaint and the answer of L. R. Hilleary were adjudicated in the former suit; that the former suit was between the same parties as the present suit and involved the identical issues that are involved in the present suit; that the said L. R. Hilleary by the decree in the former suit is barred from making the defense as set up in his answer to the complainants amended bill. We think that the decision of this point in the case is decisive of all other points raised by the appellant in this case. We find no reversible error in the case and the judgment of the Circuit Court of Saline County is hereby affirmed.

AFFIRMED.

Not to be reported.

FILED

JUL 23 1929

Robert D. Rose
CLERK OF THE DISTRICT COURT
FOURTH DISTRICT

STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM , A. D. 1929.

TERM NO. 21.

AGENDA NO. 21.

ANNA SUTTLES,
Plaintiff in Error.) ERROR TO THE CIRCUIT COURT
VS.) OF
JACOB ZIMMERMAN,) EFFINGHAM COUNTY.
Defendant in Error.)

Wolfe, J. Plaintiff in error brought a suit for damage against Jacob Zimmerman, an attorney at law. The declaration alleges that the defendant was employed by the plaintiff as her attorney to represent her in numerous matters; that he as such attorney should have exercised care and diligence in protecting the rights of the plaintiff; that he, as her attorney, did not use care and diligence in such employment, but negligently and wrongfully advised her about her rights. The declaration is quite lengthy. We will not attempt to set up the different causes or the different facts as charged in the declaration. To this declaration the defendant interposed a general and special demurrer, enumerating nine different causes for special demurrer. This demurrer to the amended declaration was overruled. After the demurrer was overruled the defendant filed a plea of general issue and five special pleas. The plaintiff filed a demurrer to the special pleas of the defendant and the court of his own motion carried the

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demurrer back to the amended declaration and sustained the demurrer. The plaintiff elected to stand by her amended declaration and refused to plead further. The court entered judgment in favor of the defendant and against the plaintiff for costs. The plaintiff excepted to the ruling of the court and has brought the case to this court for review.

The question to be decided in this case is, "Did the court err in carrying back the demurrer to the first defective pleading, namely, the amended declaration?" It is the general rule that a demurrer should be carried back to the first defective pleading, but to this rule there is a well settled exception that a demurrer to pleas cannot be carried back to the declaration when the defendant has filed a plea of the general issue without first withdrawing his plea of the general issue.

The Supreme Court of our State in the early case of Browner v. Lomax, reported in volume 23 Ill., at page 443, in deciding this question says: "Upon the other point, that the demurrer to defendant's fourth special plea should have been carried back to the declaration, on the presumption the narr was defective, we have to say the record would present a strange appearance, if, after a demurrer to the declaration has been overruled and the gneral issue pleaded, a demurrer to a defective plea should be carried back to the declaration. The general issue disposes of the demurrer, and the matters to be reached by it in every subsequent stage of the proceedings. The record would not look well with a general demurrer to a declaration overruled and then carried back over the general issue, when filed to a defective special plea."

Co., 24th Ill., at page 596, the Court passing on this same question used the following language: "Again, when this demurrer was interposed, the general issue had been filed to the entire declaration, thereby traversing every material fact in its several counts. It is contrary to the rules of practice, both in courts of law and equity, to permit a party to plead and demur at the same time, to the same pleading. When a plea is filed and an issue formed to any precedent portion of the pleadings, it waives all right to demur to it, unless the plea shall first be withdrawn. There was, therefore, no error in refusing to sustain the demurrer to the plaintiff's declaration, as the defendant, by filing the general issue, had estopped himself from questioning its sufficiency by demurrer."

In Schofield v. Settley et als., 31 Ill., p. 517, the same question was raised and the Courts say: "It is claimed by the defendant that the pleas were as good as the declaration; and as that was bad, in not setting out what the plans and specifications were, the demurrer should have been sustained to the declaration. No motion was made to carry the demurrer back upon the declaration; and if it had been, it would not have been allowed against the authority of the cases of Wear v. The Jacksonville and Savannah Railroad Co., 24 Ill, 593, and Wilson et al, v. Myrick, 26 Ill. 35, by which the doctrine is established for this court, that when a plea of the general issue is put in to the whole declaration, a demurrer to a plea cannot be carried back to the declaration, upon the well settled ground that you cannot plead and demur to the same pleading at the same time. If the declaration be so defective that it will not sustain a judgment, that may be taken advantage of on a motion in arrest of judgment or on error." This ruling has been adhered to and followed

in Culver v. The National Bank, 64 Ill., 532; and the Supreme Lodge of the Knights of Pythias v. McLennan, 171 Ill., 417.

The declaration charges that the defendant was retained as an attorney for four specific purposes, viz: To advise and assist plaintiff in paying off the debts of her mother, and discharging her real estate from the lien thereon; to so protect the interests of the plaintiff that said real estate might be saved for her; to take charge of plaintiff's business and the property inherited and purchased from her mother; and to prosecute and conduct the settlement of the estate of Sarah Settles, deceased.

If the plaintiff accepted such employment a fiduciary relation existed between the plaintiff and the defendant which imposed upon the attorney ^{to exercise due care} not only the duty in the discharge of his duties, but required the utmost good faith in dealing with the subject matter of the litigation and his employment. Morrow v. Compton, 215 App. 524; Waner v. Flach, 278 Ill., 307; Youngquist v. Hunter, 227 App., 152-156; Miller v. Lloyd, 181 App. 230-239.

The defendant's advice that plaintiff could purchase at her own sale was clearly negligent, for the reason that her inability to buy at her own sale was a matter of common knowledge which defendant was bound to know. After that inexcusable mistake defendant undertook to extricate plaintiff from the predicament caused by his negligence. This necessitated new administration, which, the declaration alleges, created an additional expense of \$50.00. This additional expense necessarily depleted the estate to that extent, and diminished the plaintiff's distributive share in it. Here, then is an allegation of negligence, and a loss of \$50.00 ensuing as a proximate result of it. Regardless of the other allegations of defend-

ant's misconduct, the declaration, in this particular is not obnoxious to general demurrer.

Taking the declaration as a whole it charges a state of facts, aside from the charges of negligence, which is reasonably susceptible to the conclusion that all of the defendant's advice was in the furtherance of a pre-concieved plan to secure the confidence of the plaintiff for the purpose of cheating and swindling her.

This declaration, although inartfully drafted, suggests the inference of a conspiracy between the first purchaser and the defendant to obtain plaintiff's property, and the defendant by deceiving the plaintiff, and inducing her to act upon his advice which he knew was improper, accomplished that object.

The statements contained in the second to the last paragraph of the declaration are sufficient to demand an explanation from the defendant. The substance of the charge is that John Zimmerman was only the nominal attorney for the Effingham bank, and that all of the proceedings were, in fact, controlled by the defendant. If that be true, the defendant occupied the unenviable and indefensible^{position} of representing and opposing the plaintiff's interests, a condition which the law forbids.

When the defendant has been shown to be so clearly negligent in the first instance, as this declaration charges, and also where it is within the range of reasonable inference therefrom that he was also guilty of fraud, in the face of the allegation that through his negligence she lost her property, the burden is upon him to show that such allegation of damage is untrue, or set up facts justifying his action. There are averments stating that by reason of the negligence the plaintiff lost her property. These

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show that as the proximate result of defendant's negligence and misconduct, plaintiff sustained substantial loss and thus states a good cause of action.

The special pleas of the defendant admit practically all of the charges in the declaration, but sets up by way of justification that what the defendant had done was by and through the order of the Court, and for that reason the plaintiff would be barred from having her action. The gist of the offense charged in this case is that what the defendant did was not done in good faith, but was fraudulently done for the purpose of cheating and defrauding the plaintiff. We are of the opinion that the special pleas to the declaration did not set up a good defense to the declaration.

Whether the plaintiff's declaration did or did not state a cause of action the demurrer to the special pleas should not have been carried back to the declaration as long as the plea of the general issue was on file.

The judgment of the Circuit Court of Effingham County is hereby reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

470
ITEM NO. 25.

FILED
JUL 26 1929
CLERK OF COURT

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

JUL 26 1929

CLERK OF COURT

254 I.A. 628²

APPEAL FROM THE CIRCUIT
COURT OF ST. CLAIR COUNTY,
STATE OF ILLINOIS.

vs.

The CITY OF BELLEVILLE
in the State of Illinois, and
the CITY of EAST ST. LOUIS,
in the State of Illinois,
Appellants.

The declaration alleges that the defendants were municipal corporations, the corporate limits joining each other; that on the 22nd day of January, A. D., 1928 and for some time prior thereto the said defendants negligently permitted a dangerous condition to exist upon a main thoroughfare connecting said cities, where West Main street in Belleville connects with State street and Park Drive in East St. Louis.

The declaration further alleges that the plaintiff with

her father and mother had attended a dance at Belleville, Illinois, on the evening of January 21, 1928; that at about twelve O'clock that night she, with her father and mother in her father's automobile, took two young men to the City of East St. Louis and left them at Alhambra Court; that after leaving the young men, the father and mother and the plaintiff were driving to their home in Belleville; that as they approached the boundary line between the two cities of East St. Louis and Belleville, a car being driven out of Park Drive failed to stop for the Boulevard sign; that the father of the plaintiff in attempting to avoid a collision with this car steered his car from the main track into the street car track and then onto the icy formation that had formed on the street at this place; that the car skidded and over-turned and the plaintiff was severely injured.

The issues were joined and upon trial in said Court the jury returned a verdict for \$5,000.00 in favor of the plaintiff. After a motion for a new trial was overruled, judgment on the verdict was entered for sum of \$5,000.00, and the defendant cities perfected an appeal to this court.

The language in the declaration is not as clear as it might be in regard to the description of the icy information that is alleged to be the cause of the accident. It is conceded by both cities in their briefs and argument that there was an icy formation at the intersection where the Bluff Road, or Park Drive enters the main street which connects East St. Louis and Belleville. The evidence shows that this ice was formed from a manhole a little ways east of the line between the two cities,

the water flowing down the hill from the manhole. The principal part of the icy formation was in the City of East St. Louis. The evidence further shows that the accident which caused this girl's injuries started in the City of East St. Louis and the car turned over in the City of Belleville. The evidence further shows that this icy formation had existed and been on the street for at least two weeks prior to the time of the accident. A careful reading of the declaration, we think, shows that the allegation of the duty to keep the same in safe condition referred to the condition of the street and not to the icy formation on the street, and that each of the cities owed a duty to the public generally to keep its street in a reasonably safe condition for travel.

It is the contention of the defendants that the allegation and declaration having been joint and not several the court should not have given the instruction that one city might be liable and the other one not liable. This instruction was not offered or given at the suggestion of the plaintiff. The court, however, in giving the instructions to the jury as to the form of a verdict that they might use, did give such an instruction. The jury by their verdict have found both of the defendants guilty, therefore, neither of the cities were prejudiced by the giving of such an instruction.

The next assignments of error are that the Court erred in admitting in evidence the statutory notice that had been served upon the City Clerks and the City Attorneys of the defendants; that the notices did not properly state where the accident occurred; that the declaration should set forth the statutory notice in *hoc verba*, or in its *terma* or *tenor* or legal effect,

and that none of these rules were complied with by the pleadings in this case. The amended declaration charges "that the plaintiff caused to be filed in the office of the City Clerk of the City of Belleville, Illinois and in the office of the City Attorney of Belleville, Illinois, on the 25th of April, 1928, and in the office of the City Clerk of East St. Louis, Illinois, and in the office of the City Attorney of East St. Louis, Illinois, on the 26th day of April, 1928, a detailed statement setting forth the time, place, and cause of the accident, the names and addresses of the injured persons and the nature of their injuries, and also the names of the physicians who attended the persons injured, and also the addresses of said persons."

No doubt the statute requiring a notice to be filed with the City before the plaintiff can maintain a suit against a city for personal injuries and the statute prescribes what the notice shall contain, but does not require that any particular form be used in giving such notice.

It is conceded that a notice was given to each of the cities, but it is contended that it does not conform to the requirements of the statute. In *Macomb vs. the City of Chicago* 263 Ill. page 514, the Court said, "If the statement so designates the place that the officers of the town, being men of common understanding and intelligence, can by the exercise of reasonable diligence and without other information from the plaintiff, find the exact place where it is claimed the damage was received, it is in this respect sufficient, because it fully answers the purpose of the statute." It is not intended that the giving of a notice should be used as a stumbling block or pitfall to prevent recovery by a meritorious plaintiff.

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It is the contention of the appellants that there is no such street in Belleville as 'West Main' Street. Three or four witnesses for the plaintiff testified they either lived or did business on West Main street in the City of Belleville, Illinois. The proper name of the street is probably Main street, but from the evidence in the case it shows that this street near where this accident occurred is known as West Main street in the City of Belleville, Illinois. We are of the opinion that the notice given by the plaintiff to the defendant cities was sufficient to give each of the cities due notice of the time, and place where this accident occurred, and they could have easily ascertained, by the use of ordinary diligence, the details in regard to the accident. We think the court properly, under the allegations of the declaration, admitted these notices in evidence.

Counsel for the plaintiff in his closing argument to the jury stated to the jury that they could bring in a verdict for the plaintiff for \$15,000.00. An objection was made and sustained to this statement of counsel. Later in the argument the plaintiff's counsel repeated the statement and upon objection the Court sustained the objection to the argument. Later on in his argument he stated to the jury that, "He would not have the injuries that the plaintiff had sustained for the amount of \$15,000.00." An objection was sustained to the remarks of the attorney and the jury instructed to disregard it. The remarks of the attorney were objectionable and the court very properly sustained the objections and directed the jury not to consider such remarks of the attorney in making their verdict, but to totally disregard it. We cannot see how this argument would

affect the jury in any way, with the exception of increasing the amount of the verdict. The jury would first have to find that the plaintiff was entitled to recovery before they would be entitled to any damages. It is not claimed by the defendants that this verdict is excessive. So under the circumstances we do not consider this argument, although improper, would be sufficient error to reverse the case.

The declaration charges that it was through the negligence of the defendants in permitting the dangerous condition to exist on this main thoroughfare that the accident occurred. Another count charges that the defendants knew, or by the exercise of their duty in that behalf should have or could have known of the dangerous formation of ice then and there upon the thoroughfare and it was the duty of said defendants to keep the street in a safe condition so as to avoid injury, etc., etc.

Another count charges that it was the duty of the defendants to place danger signals at the place where said icy obstruction or formation was negligently permitted to exist.

There is testimony in the record that this icy formation had existed at least two week prior to the accident. It is a question of fact for the jury to determine whether this dangerous condition did exist, and whether it had existed long enough that the officers of the defendant cities in the exercise of their official duties should or could have known of this dangerous condition. The jury by their verdict have found in favor of the plaintiff and therefore found that the defendant cities did know or should have known of this dangerous condition. All facts and circumstances attending this accident as to whether the plaintiff was using due care and caution for her own safety

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at the time of the accident, or whether the defendants were negligent in allowing this dangerous condition to exist on a main thoroughfare leading from the City of Belleville to the City of East St. Louis to exist as it did, were facts for the jury to decide.

We think the record sustains the finding of the jury and we find no reversible error in the case. The judgment of the St. Clair County Circuit Court is hereby affirmed.

Not to be reported.

FILED

JUL 20 1929

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1929.

TERM NO. 32.

AGENDA NO. 24.

254 I.A. 628³

ZARDIA S. KOONTZ,
Appellee,
VS.
CONTINENTAL-COMMERCIAL
FINANCE CORPORATION,
Appellant.

APPEAL FROM THE CITY COURT
OF GRANITE CITY, ILLINOIS.

WOLFE, J.

This is an action of trover, brought in the City Court of Granite City by appellee against appellant to recover for the alleged wrongful conversion of a used Dodge Special coupe automobile. The appellant was the assignee and holder of a promissory note and a conditional sales contract, both of which were executed by the appellee and were given for the purchase of the automobile. The conditional sales contract prohibited the appellee taking the car out of the State of Illinois. The intention of the appellee to remove the car to the State of Mississippi being a matter of dispute between these two parties, appellant came into possession of the automobile under the insecurity clause of the contract. Before the case was tried, the appellant had sold the car at public auction, pursuant to the terms of the contract, and the appellee refused to accept from appellant the sum of \$17.68 which was the difference between the amount received at such sale and the

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amount unpaid on the note and conditional sales contract. There was a ~~verdict~~ and judgment in favor of the appellee in the amount of \$400.00.

Appellant assigns as error that the verdict and judgment are not supported by the evidence for the reason that no proof appears in the record establishing the current market value of the automobile at the time of the alleged conversion. We consider this assignment of error well taken and a vital objection barring an affirmation of the judgment of the trial court.

The proper measure of damages in an action of trover is the current market value of the property at the time of the conversion, with interest from that time until the trial. *Sturgess v. Keith*, 57 Ill. 451; *Spaar v. Slakis*, 180 Ill., App., 304.

Appellee purchased the car on March 1, 1928, from the Bohn Motor Company of Granite City for \$550.00. In payment for the car appellee paid \$80.00 cash; he was allowed \$100.00 on a used car traded in by him, and for the balance of \$370.00, plus \$10.00 for insurance, he gave his promissory note, payable in monthly installments, and executed the conditional sales contract. The car was sold on September 8, 1928, for \$240.00. The monthly payments due were paid up to the day of the sale, leaving unpaid on the note \$233.32.

It was the duty of the jury to determine the current market value of the car from the evidence in the case at the time of the conversion and allow the appellee the difference between the value of the car and the unpaid purchase price at the time of the sale. The verdict being for \$400.00, the jury must have arrived at the conclusion that the car was valued at \$633.32. There is no evidence in the record that the car was at any time valued at such

an amount. In this case there is a difference of \$310.00 between the price for which the car was sold at the private sale and the price received for it at public auction. There is no testimony in the record as to the value of the car at the time of the alleged conversion.

The verdict and judgment cannot be sustained because the evidence in the case was not sufficiently informative as to the value of the car at the time of the conversion to enable the jury with reasonable certainty to apply the rule of damages established in actions of trover.

Objection is also made by the appellant to instructions numbered 2,3,4,5,6&7, given on behalf of appellee.

We are of the opinion that instructions 2, 3, and 6 are subject to criticism for the reason that they omit the right of the appellant under the insecure clause of the contract, to re-possess the car if it had reasonable grounds to deem its security unsafe or insecure by reason of the appellee's alleged intention or contemplation of removing the car out of the State of Illinois. We are not impressed by the objection urged by appellant against instruction No. 4. In view of the rule of damages in trover, as herein pointed out, instruction No. 5 will no doubt be modified in case of a re-trial of the case. As the instructions given for appellee omit the right of the appellant to re-possess the car, as above indicated, the jury was unable to follow instruction No. 7 which directed the jury to find in favor of the appellee if "the evidence tending to show an unlawful taking or conversion of the automobile in question by the defendant or the defendant's agent, preponderates in favor of the plaintiff, even though but slightly, then your verdict should be for the plaintiff, etc." Our Supreme Court has decided that the use of the adjective 'slight', in

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an instruction to the jury, with reference to the preponderance of the evidence, is confusing to the jury and should not be given. *Teter v. Spooner*, 305 Ill. 198; *Revits v. Rapid Transit Co.*, 327 Ill. 210. Appellant also complains of the trial court's refusal to give certain instructions offered on its behalf. These refused instructions, in-so-far as they assume the right of the appellant to arbitrarily repossess the car, under the insecurity clause of the contract, we think were improper.

The judgment of the City Court of Granite City is hereby reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.



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